hams and loins. At this time I can't do that. They are summarized into those figures. We have charged everything went in there and they received credit for everything that was sold out of there.

MR. PICKREL: All right.

THE WITNESS: That is a summary.

* * *

(138) Q. Will you look at these weekly sheets and see if you can find where any carcass was sold?

A. No. On those sheets they show as fresh pork sales.

* * *

(152) Q. Now that takes care of that. Now, a ham roast, is that part of a hog, or is that made out of —

A. It is more of a retail cut we do not produce over at our plant.

Q. They cut from what?

A. From a ham.

Q. They cut out of a ham?

A. Yes.

Q. So you don't work on that at all?

A. No, that is retail.

Q. What about this pork tenderloin?

A. That also — that is the inside of the loin here. We sell the pork loin with the tenderloin in. We do not remove that.

Q. So the boneless ham roast and the pork tenderloin, those you do not process at all?

A. No.

* * *

(157) Q. Where also does it go?

A. The bones and indeible part of the head which is removed in the killing process, will go to the tankage room, grease and tankage.

* * *

(165) Q. And you say 38 percent of it is represented (166) by smoked meat?

A. No. I say 38 percent of it is represented by meat transferred for processing for smoke.

Q. Then is the 38 percent too high or too low?

A. I don't know. Perhaps I haven't made myself clear. For instance, that is fresh weight there. Your smoked weight is different.

Q. More or less?

A. It shrinks in the smoking process.

Q. How much?

A. That varies.

Q. Well, about.

A. Oh, perhaps on an average of 10 percent.

Q. On an average of 10 percent?

A. Yes.

Q. 10 percent from the fresh weight it shrinks?

A. No. You asked me what it shrinks in the smoking process. I said approximately 10 percent.

Q. From what?

A. From the weight that goes into smoke, which would be cured weight.

Q. It is first cured. That is where your 3 percent comes in. Right?

A. No.

Q. What percent does come in then when it is (167) cured?

A. Let's take a particular item. You take the fresh ham and you cure it. Then you cure it by pumping. The artery is exposed on the killing floor. You inject curing pickle into the artery. It is held in pickle. It shows a gain in weight.

Q. Then it will shrink 10 percent from that?

A. From the gain in weight, yes, approximately 10 percent.

Q. What should we have there, if 38 percent is not right?

A. Just what we have there.

Q. 38 percent?

A. Yes.

Q. 38 percent of that hog goes into —

A We are accounting for this hog in various stages. That is the fresh weight there that we are accounting for. All right. Now, whether that ham gains or shrinks 5 percent or 10 percent, as far as our claim doesn't make any difference, because when the ham is processed into smoked weight, we check the actual weight of smoked ham and account for those as smoked hams, not as fresh pork.

* * *

(182) Q. Where is there any record kept of the hams that go down the chute into the cellar, or is there a record kept? Can't you tell us?

A. Yes. I not only told you, showed you, I went through the records individually. It is still fresh pork. They get a hog and it is still fresh pork until it is taken away for some other purpose. When it is taken away for the purpose of curing, then a record, an entry is made of what quantities were taken for cure.

Q. Fine. That takes care of that group. What (183) about the other group that stays back in the cellar room, fresh?

A. That will be taken up to the shipping room, the quantities that they want to ship. If they don't sell them all out, they will be brought down and they will be transferred to cure, at which time a record of transfer will be made.

Q. I see. So you have a record then of every ham that goes into the curing room?

A. Yes, sir.

Q. But you don't have any record of the hams that are kept as fresh hams that don't go into the curing room?

A. That's right. But I would like to explain that. In an accounting sense, all of that probably — of the hog is considered fresh pork, and the fresh pork department is credited for those items which are transferred to other departments. So, in effect their record is when the total hog goes through. It is all there is until it is transferred to some other department or sold, at which time they are credited from a sales record.

Q. But as long as it is fresh pork, in a ham, it is still fresh pork and no separate record is kept of it; is that correct?

A. That is correct.

* * *

(184) Q. Cure, then a record is kept?

A. That is right. In other words, it is taken away from the fresh pork department and transferred to the cure department, at which time the fresh pork is credited for the weight taken.

Q. And the cure is charged with it?

A. Yes, sir.

Q. So your records will show you, at any time since you have been there, just how many hams there are in the cure department?

A. Yes, sir.

Q. So when somebody steals a couple of hams out of that department, that upsets your records; doesn't it?

A. If you have a truck of hams standing there and somebody steals two hams, you, perhaps, wouldn't recognize at that time that two hams were gone.

Q. I see.

A. When you put all the weights together and the weight does not come up, then you know there has been something happened.

* * *

(199) Q. So that in that period from December 4, 1948 to October 22, 1949, you never had an actual inventory by count, did you?

A. No. Those two periods not being fiscal closing would not be accurate, but you would only be concerned with two inventories there because the first inventory and the last, all the other intervening inventories cancel themselves out, and any percentage of error that might be in the first inventory or the last invetnory would not amount to anything.

* * *

(220) Q. In this complaint, the original complaint, the amended complaint and the second amended complaint, the Sucher Packing Company says that for three years they have certain losses, beginning in November, 1947 and three years after November, 1947 would be November, 1950. Do you have any records at all with you or anyplace else, that shows anything about any losses beginning November, 1947 up to these papers that you have prepared and brought in here, which begin in December of 1948, 13 months afterwards?

A. No. There are no records available for that period that would disclose the thefts. And the reason for that will be they were not started to be compiled until sometime thereafter. Weekly product analysis statement was not installed until a much later date.

* * *

(244) A. No. I testified our inventories at fiscal clos-

ing were made by the auditors and are accurate inventories.

Q. As of October 31st?

A. Or the Saturday nearest that date sometimes falls on the 30th, 29th, and in the period which you just mentioned, I believe one of the audited inventories was there. The second period began at the end of October, would have been the last Saturday of October, which would have been an actual inventory supervised by our auditing firm.

Q. Well, I am very sorry.

MR. GOLDMAN: Let me clarify the matter, your Honor. The first period ended October 22, 1949, but the second period began the nearest Saturday to November 1, 1949.

MR. PICKREL: November 5th.

MR. GOLDMAN: Which was the nearest Saturday to October 31st. The fiscal year was November 5th. Now, there should not be any confusion about the matter. The first period of 47 weeks did not end at a fiscal year ending. It ended October 22nd, but the second period began on a fiscal year. The second period of 45 weeks, originally 48 reduced to 45, began on a fiscal year beginning.

* * *

(245) MR. PICKREL: November 5th.

MR. GOLDMAN: I think it was the week ending November 5th.

MR. PICKREL: All right.

* * *

(259) Q. That's right. We will get to those in a minute. In other words, if you made a mistake which caused a shortage, you also made mistakes which caused overages, didn't you?

A. Yes.

Q. Those mistakes could be caused by inventory errors.

A. Yes, which washed themselves out. Or possibly sale

going through in a wrong week, as I think I (260) stated before, when the inventory is taken, operation still going on, and some particular time a person might ship out some product which has already been inventoried, and there would be a double credit to this department, and that woud offset itself the next week, because the sale went through the wrong week would affect the weekly results. But inasmuch as it was included in the period, there would be no effect on the 1947 or 1948 period results.

* * *

(272) Q. What happened on November 1, 1948 that your figures became so accurate?

A. I think I answered.

Q. Because you got there before then?

A. That's right. It is a big plant. We wanted to install a system. You don't go in and say "well, I am going to have an accounting system". You have to go through the plant. You have to train employees; tell them what you are trying to accomplish, what you want them to do, what you expect from them; have to get scales installed. All that takes time.

Q. What happened that made your figures more accurate beginning November 1, 1948? Did you install a new set of books, as a new system? You know there are various systems for keeping records. Did you install a new system (273) about that date?

A. No.

Q. Do you know of anything that happened about that date that made your bookkeeping more accurate?

A. Yes. We might have got a scale where we could weigh something in a location, which we did not have heretofore. In preparation or installation of this system, we would try a department for a couple of weeks, then drop it, and then go to another department, and at that time, or

about that time, I would say, it is when all the departments were functioning at the same time. So a statement could be prepared. Prior to that time we didn't have that.

Q. That is why you think your book records were faulty prior to that November 1, 1948?

A. When you speak of book records and books of account, they are a little different from this record. In other words, you can have perfect records, as far as total sales are concerned, and total purchases are concerned, and every other transaction, in total, your records can be perfect. But they don't break them down to various departments and so forth, and that is what these sheets do. So these sheets, in total, tie up to the total records which always existed, but the break-up on those records did not exist.

* * *

KENNETH SMITH — Redirect

(309) Q. Is there anything about the Sucher Packing Company buildings or equipment, as was there, during the period of time 1948 going toward the end of 1950 which would cause meat to shrink more than the normal shrink to which you have testified?

MR. SELVA: We object.

THE COURT: I will sustain the objection.

(MR. GOLDMAN: I will proffer that answer, too.

(Out of the hearing of the jury.)

MR. GOLDMAN: The answer to the question is "There is no such condition".

* * *

(311) Q. Now, will you please tell us, Mr. Smith, — (312) some question came up as to the manner in which the weight of products which are sold are tabulated. Are those weights — how are those weights determined?

A. Well, when an order is filled, the product is put on the scale and weighed, and the weights are entered on the sales invoice.

Q. Those weights are actual scale weights?

A. That's right, at the time the order is filled.

* * *

(329) Q. Anything else on November 5th that might be of interest? Let's see. Now, am I correct in my understanding of your testimony that this week of November 5th is the end of the fiscal year period reflecting your actual count inventory?

A. It seems that November 5th would be the first week in the new year and would indicate that the opening inventory was at the closing of the fiscal year, which inventory was supervised by our auditors and which inventory is correct.

Q. All right.

A. The beginning inventories.

Q. And that inventory supervised by your auditors was an actual count inventory where they went right around and counted every piece?

A. Yes, as near as humanly possible.

Q. And that, then, is reflected in your November 5, 1949 figures which are now in front of you?

A. Yes.

Q. So that any errors then, as I understand, that had occurred early in the year, were all washed out on this actual count inventory at the end of your fiscal year, on or about October 31st?

A. As far as inventories are concerned, yes.

Q. They were?

(330) A. In an — a series of figures in a cumulative period the opening inventory at the beginning period and

the closing inventory at the end period would be the only two inventories that would affect final results. The other 45 inventories would have no effect on the 47-week period.

Q. This sheet right ahead of you is based on an actual count inventory?

A. Yes.

Q. November 5, 1949?

A. Well, no, it would have been October 29th or 31st. That is where you start from. November 5th is the ending day for that particular week.

Q. But that actual count inventory had taken place prior to the preparation of this statement for the week ending November 5th?

A. Yes. You finish up one week and start with the next. What you have left at the end of one week —

Q. But this particular November 5, 1949 statement contains the results of your actual count inventory taken at the end of that fiscal year?

A. Yes, that is the inventory — the opening inventory of this week is the inventory that we end up our fiscal year with, the prior fiscal year.

* * *

ABE SOLOMON — Cross

(360) Q. All right. Eliminate the word "again". So your reduction, which represents the amount of meat during the period of the claim, pork products which were given to the employees of the Sucher Packing Company without charge, represents an estimate?

A. The figures used in the claim reduction represents an estimate, yes.

* * *

(376) Q. And you can tell me whether or not the

processing of hogs in 1950, from the time you got there, (377) is about the same as it is today?

A. In most respects, yes.

Q. And the capacity of the cooler is about the same in 1950 as it is today?

A. Yes, sir.

Q. And the general hog operations in cutting and trimming and whatever you do, was about the same in 1950 as it is today?

A. Yes, sir.

* * *

Q. You have testified that the operations were about the same, haven't you?

(378) A. Yes, sir.

* * *

(396) Q. Where does the fat go to?

A. The tank truck is right at the side of the man during the cutting and it passes out of the room when loaded, loaded on a scale and sent to the lard department.

* * *

(402) Q. Are those weekly analysis sheets taken by various departmental employees?

A. Yes, sir. The information to make them up is provided by people throughout the plant under the supervision of their foremen.

Q. Under the supervision of the foremen?

A. And the superintendent of the particular department verifies the transfers.

Q. Then you have certain employees who would make a record of these various component parts and turn it into the supervisor of that department?

A. That's right.

Q. And then where would the supervisor take that compilation?

A. He would take it to the office of the cost accounting office.

Q. And then you have other employees there?

A. Yes.

Q. And here are a number of figures now in (403) different categories that have been taken in, we will say, pork department. What is done by the young lady or the young man in the office who gets those figures?

A. They compile them. They come up with a composite transfer of a particular item for the week; they enter them on work sheets.

Q. They put them on work sheets, do they?

A. Yes, to add them.

Q. Then, we have the original sheet and we have — original sheet of the compilation and we have the work sheet. Now, where does the work sheet go?

A. The work sheet becomes part of the — along with the original compilations becomes part of the records which eventually end up in this product analysis.

Q. Who finally gets all of these various totals to enter them on the weekly product analysis sheet?

A. The person who is normally the cost accountant in the plant, who works up the product analysis.

* * *

(417) Q. I am not asking you what you felt. I am asking you what you did.

A. We took our loss for the period and in order to avoid any difficulty, we just took 1/16 of it and reduced it in order to come back to the weeks which could be stated were in the period on the claim. We made no claim for any week after September 11th, although perhaps we could have.

* * *

(444) Q. Now, initially, that was 11,104, wasn't it? See that one that is erased there and that was changed to 1104.

A. It might have been. It looks like there is an erasure.

* * *

Q. It is obvious. That is how we happened to see it.

A. The figures don't bear out any 11,000 pounds.

Q. That is why it was changed to 1100?

(445) A. Those are the actual figures.

* * *

A. I don't recall what we did on that specific date of April 23, 1950, but I can repeat what our procedure was in all the weeks that I was there. These sheets are the result of a large number of other sheets containing basic information, sales inventories, at the beginning period, and ending period, sales analysis. When we come up with a figure, that is out of line as this one, we would go through our figures, recheck them, trying to eliminate the possibility that any part of the loss was not due to theft and it was due to any error on our part.

Q. And you were looking for errors, weren't you?

A. Certainly.

(446) Q. Sure.

A. Any correction we might have had we would have made before this figure was left here.

THE COURT: Your figure, after the investigation was made, was still left?

THE WITNESS: That is right.

* * *

(480) Q. Who would cut those pork and hams and loins for the hotel and restaurant trade?

A. At the time that we had it, we had a separate department, fabricating the pork.

Q. Would you bone it?

A. Certain items were sold with bones removed, yes.

* * *

ABE SOLOMON — Recross

(559) A. We know from experience that the net deviation would be very small, would be between 5 and 10 pounds a vat.

Q. Between 5 and 10 pounds a vat?

A. Roughly.

Q. All right, roughly. What would the deviation be in the week ending January 15, 1949 in hams?

A. I would say it would probably be zero, because there would be as many vats over 1400 pounds as there would be under 1400 pounds.

Q. I didn't ask you that question. It is (560) interesting because you say there would be as many pounds over as under; is that right?

A. Probably would.

* * *

(561) Q. Mr. Solomon, I want to call you attention, and it may be that I have overlooked it, to lard. Is there any item here on this analysis sheet for lard?

A. Well, lard is not included in the claim. That is not considered fresh pork.

Q. I know. But it comes out of that 9,000,000 pounds of fresh pork?

A. Yes. The pounds in these lard tanks, and I don't know whether they are included in these work sheets.

Q. (No question)

(562) A. I don't know. I will see if I can find it. Here it is: 41,481 pounds of fresh pork transferred to lard.

Q. Where did you get that 41,000-pounds figure?

A. Here (indicating).

Q. I know it is there, but where does it come from?

A. It would come from a total of the weights going into lard, which weights are not with these papers.

Q. It matches up in the dollars with the lard, so I know it is the same thing. There is a dollar value of the lard of $5528.08, is the amount that is set opposite this 41,481 pounds. Therefore, lacking the other papers where this lard weight was listed, I know that 41,481 pounds is credited to fresh pork of the fats that went to lard.

Q. It is not shown on this transfer inventory?

A. It is shown in total and the detail must be in some other papers in that week's envelope.

* * *

(563) A. This business is complicated. Part of the lard that goes into the tank came off the kill and, therefore, they are not a part of the 9 million pounds because they are not weighed. They are not part of the weight when the hog goes into the cooler. In other words, leaf fats and the cut fats that are taken off the hog prior to the point at which we take a dressed weight contribute to making up the fats that go into the lard. The fats that come off the cut — in other words, the fats that go into lard that come off the — what?

Q. Cooler weight, let's say.

A. After the point at which the hog is weighed going into the cooler, they are credited to fresh pork, since they were included in fresh pork.

HADELER (Cross)

(583)

Q. Now that shrinkage at 4800 pounds could come from any of three reasons; first, theft; second, additional shrinkage not allowed; third, errors in computation of figures on

transfer, taking inventory, or any other error, those three things are the reason for that shrinkage; is that correct?

A. I would say that is correct. However, we haven't used one single week. We have taken a series of weeks; in doing so we eliminate certain of those errors you have reference to.

* * *

(624)

Q. And you don't know that any inventory figures in any of these weekly sheets are correct, do you?

A. I don't know that they are not correct either. And as for the intervening inventories, all through the period, we have made the point, I hope, it makes no difference whether those inventories are correct, or not correct. They all wash out, the beginning and the ending.

* * *

(625-6)

Q. I beg your pardon. I thought I understood you to say that.

A. I said we tabulated our exhibit here from the copies of the work sheets. We were in there off and on during the year. We knew they had been making these up as a regular matter of course. They were using them in their operations at all times. We had no reason to think they were not accurate all the way through, as accurate as they could make them.

Q. And you had no reason to think they were accurate either, did you?

A. Except in general. We never find too many adjustments to make out at Suchers. So we presume that basically it is accurate.

(626)

Q. You and I have trouble getting the same place. I

want to know, did you have any reason to believe that these inventory figures were either accurate or inaccurate, either one?

A. All I can say is, from our general experience out there, basically their records are accurate, the ones we have checked. For what reason should I think this is inaccurate?

FRANCIS MERICA — Direct

(672) Q. Mr. Merica, what item, if any, did you find on your further check.

MR. SELVA: We object.

THE COURT: I believe you told me you found one item.

THE WITNESS: One item. There had been several delivered there, but there was only one —

THE COURT: Just state what you found yourself.

THE WITNESS: I found one fresh ham that had been roasted.

THE COURT: Where?

THE WITNESS: On McCall Avenue, right across from the Classic Gardens, at a bar, janitor's house that worked at Classic Gardens.

* * *

McCONKEY (Cross)

(684)

Q. Mr. McConkey, did I understand you to say that these little scraps that would adhere to the knife and that would drop on the floor would be about ¼ of one percent of the hog?

A. I hardly think it would be that much, sir.

(685)

Q. I thought it was what you testified to just a moment ago: It would be a very small amount, about ¼ of one percent of the hog killed.

A. I believe I said it would be less than a quarter of one percent.

Q. Less than a quarter of one percent?

A. Yes, sir.

* * *

(686)

Q. If you didn't, I stand corrected. When did you first decide that the cooler shrink would be 1½ percent as you testified?

A. I think I said 1½ to 2.

Q. When did you first decide that cooler shrink would be 1½ to 2 percent?

A. I have seen many tests; made them myself.

Q. Did you determine that after talking to Mr. Goldman about this case?

A. No, sir.

Q. Or Mr. Smith, about this case?

A. No, sir. I have known that a long time.

* * *

(693)

Q. And you had no reasons to suspect that any great quantity of meat was being taken from this plant before the day of Harris's apprehension?

A. I said I was told, —

Q. I am not asking you what you were told. I am asking you what you observed.

MR. GOLDMAN: The question was "You had no reason to suspect." He is answering the question asked.

MR. SELVA: All right. Go ahead and answer it.

A. (Continued) I was told by my superiors that our inventory figures showed that there were some losses.

* * *

(702)

Q. Had you, as plant superintendent, made any test to determine cooler shrink, or cutting shrink, as they existed at the Sucher Packing Company?

A. I have made some for my own information on groups of hogs that we were shipping out, checking weights in and out for that purpose, for my own information.

* * *

(703) Q. Can you tell me when you made those tests of the cooler shrink of the whole carcass of the hog?

A. When?

Q. Yes, sir.

A. Well, it was during the time we were shipping dressed hogs, four or five years ago. I couldn't give you a date.

* * *

(706) Q. Can you tell me when a vat is not full, the weight of that vat is estimated?

A. No, sir.

Q. How is that weight determined in the vat that is not full?

A. The hams are weighed before they go to the vat. They are weighed in this truck and they are removed from the truck and go over a table where they are processed in our (707) curing process and then they are taken and put in the vat.

* * *

(708) Q. You want to tell the Court and jury that in no instance that you know of, that no more than one ham would be added or taken away from a complete vat?

A. I don't know of it ever happening.

Q. Could be one or two hams, couldn't it, in a hundred hams?

A. I see no reason for it to happen.

Q. Would it be?

A. I have never known it to happen. . .

* * *

(708)

Q. Can you tell me whether or not the operations, during the time you were there, are the same as they are today?

A. I would say they are in all operations — or what operations do you mean?

* * *

(708) Q. I am referring simply to the hog operations, which is the topic of controversy here. Would you say that the capacity of the killing room is the same today as it was in 1949?

A. Yes, sir.

Q. Would you say that the operation of the (709) cutting room would be the same today as it was in 1949?

A. Yes, sir.

* * *

(719)

Q. Mr. McConkey, have you ever run a test, yourself, to determine the amount of shrink in the ham during the time it is in the cooler room?

A. I have.

* * *

(719) Q. Are you acquainted with the weekly production analysis sheets?

A. I have some ideas of it. I am not familiar with it because I don't get a copy of it.

* * *

(719) Q. What personnel in those departments obtained the weight and turned these calculations over to their supervisor?

A. There would be a daily report. They would (720) turn it directly to the accounting department.

Q. That is, through you?

A. Not necessarily through me.

Q. Then you don't see all of the daily reports that might go to the accounting department?

A. I don't know what reports you are speaking of.

Q. I am speaking of weight or amount, if they count that, or any other reports which might indicate a running inventory.

A. That is a daily routine. Wouldn't necessarily go over my wesk. It would go right to the accounting department.

* * *

(723-724)

Q. Can you tell me whether you have ever observed any casings split and bursted?

A. I have.

Q. What is done with that sausage?

A. That sausage is reworked. The casing is removed and it is reground and worked in other products, sausage products.

* * *

(734-5)

Q. If a person miscuts on ham. or is careless and part of the cuts are dropped onto the floor, you would get a greater degree of cutting shrink in a cutting room?

A. If you dropped ham on the floor, or part of a ham, I certainly wouldn't throw it away. I would wash it and clean it up.

Q. I am speaking of cuttings that make up a cutting shrink.

A. Well, it depends on what it was. If it was a piece that — a large piece rather than just a small scrap, why, he would be allowed to wash that or trim it and save it.

Q. If there were small scraps then, of course, those would be disposed of?

A. Those would be swept up, probably go to inedible rendering.

* * *

Q. And, of course, when those breaks occur, that affects the product in the refrigerating rooms, does it not?

A. Well, it would be — I can't recall any serious trouble that we have had that would cause us any difficulty.

* * *

(736) Q. You don't know how long they broke down, or how extensive they were?

A. I know that we haven't had any extensive breakdowns.

* * *

REDIRECT

(741)

Q. Mr. McConkey, you testified concerning the refrigeration at the Sucher plant. Is there anything in those particular areas which are not refrigerated which would affect the shrink in the way the product is handled at Suchers?

A. None. The portions that are not refrigerated (742) have no bearing on this product because they are merely transported through these departments to other departments which do have adequate refrigeration.

Q. With reference to the the discussion concerning piece count, Mr. McConkey, were there inventories taken prior to the installation of the system of counting the actual pieces?

A. On the inventory?

Q. Yes.

A. There were because they were so situated it is a very easy matter to count them when they are hanging on trees or on racks.

Q. Prior to the time they made a record of the actual number of pieces, was there a record of the weight inventory?

A. The record of the weight was used.

MR. GOLDMAN: That is all.

RECROSS EXAMINATION

Q. The record of the count of pieces commenced sometime about the middle of 1950 when it was inaugurated, didn't it?

A. As far as I can remember any inventory of smoked meats, that is what we are referring to, that was a piece count also even though we didn't have a complete (743) overall count system of the pieces going through cure. But any inventory count in the smoked meat cooler, I am sure was always used and still is.

Q. But then you didn't have a count of the pieces going through cure, the fresh pork pieces, the loins and things of that character of fresh pork product, until you inaugurated the count system, as you say of about the middle of 1950; is that right?

(743)

A. As far as I know, we did have a count, inventory count, on this pork, also, on loins for inventory purposes, weekly inventory.

Q. Now, in addition to the smoked hams you now include a count on loins and a count on fresh pork; is that right?

A. For inventory purposes.

Q. So that what you told Mr. Greene, that you were just inaugurating the count system, was a mistake?

A. No, it was not a mistake. That was a little bit different.

Q. Were you inaugurating a count system at that time to attain accuracy?

A. On hams and bellies.

Q. You were inaugurating a count system to attain accuracy, weren't you?

A. We were.

(744) MR. SELVA: That is all.

RE-REDIRECT

Q. The hams and bellies that you mentioned, Mr. McConkey, what hams and bellies are you talking about; what state of the process?

A. Going in cure.

Q. Going in cure?

A. Yes, sir.

MR. GOLDMAN: That is all.

DAVIS — Cross

(762)

Q. And, therefore, their shrink could be higher or lower than the figures that you have submitted, couldn't they?

A. From my observation, going from cooler to cooler, department to department, I would say they net the average.

* * *

(765)

Q. Just what did you observe this morning at Sucher Packing Company in connection with their cooler room. let's say?

A. I was taken on a tour through the plant. I went in every cooler in the plant. I felt the products. I looked at the type of refrigeration that they had and also noticed if the product contained moisture on the outside or if the floors were damp in the cooler.

Q. What would the indication be if the floors were damp in the cooler?

A. That the room had quite a bit of humidity in it or dampness.

Q. Do you consider refrigeration as one of the pertinent factors in determining shrink?

A. To a certain point, yes.

* * *

(776)

Q. When you went through the plant, did you observe any packing rooms, rooms where they were packing sausage and sausage product?

A. Yes.

* * *

(777)

Q. Did you go down in the sausage cooler?

A. Yes, I was in the sausage cooler.

Q. Did you observe the product in the sausage cooler?

A. In the ground state, yes, and the trimmings, yes.

Q. I am speaking of sausage in casings.

A. Oh, excuse me.

Q. Did you go in that cooler?

A. Yes, I was in that cooler.

Q. What was the purpose?

A. To look at the finished product to see exactly how it was handled, the flow through the plant.

Q. Did you examine the finished product?

A. I felt some bolognas for firmness.

Q. Did you examine anything else in the cooler?

A. No.

Q. Then you don't know what the temperature was in that cooler.

A. Yes.

Q. You do?

A. Yes.

Q. How do you know what the temperature was?

A. I asked them about the temperature in that room.

Q. Wasn't there a thermometer in the room?

A. Yes.

Q. You didn't look at that?

A. No.

Q. You asked what they held the temperature at?

A. Yes.

* * *

(779)

Q. Did you go inside the smoked cooler where they cool the smoked products?

A. Smoked meats?

Q. Yes, sir.

A. Yes, I did.

Q. What did you check in that room?

A. I looked at the operations, saw how the product was hung in the room, and I also looked at the temperature in that room.

Q. You didn't ask them what they held the room temperature at?

A. Yes, I did. They said 50 degrees.

* * *

(782)

Q. That is spoilage?

A. It might be considered spoilage, because it would be used in the plant.

Q. An edible meat?

A. Yes.

Q. You would have to trim them down?

A. It might go into lard, if you have any trimmings.

* * *

(787)

Q. Would you say that packers who use humidifiers get a lower shrink?

A. Normally, humidifiers are used in some smokehouses to reduce the smoking shrinks. But normally, we don't put too many of them directly in the coolers. That is part of the refrigeration.

* * *

(799)

Q. Did you make any inquiry at the Sucher Packing Company whether or not any of those factors existed in 1948, 1949 and 1950?

A. To a certain extent.

Q. What extent?

A. I asked if the departments, present departments, were located in approximately the same positions in the plant as they were in the past, and he said "yes", and from my observation of the departments and the way the doors were being opened and closed, were normal operations and looking at the floors and the drains and everything and the moisture off the products, I formulated that most of the things you have on the paper were actually being controlled in that plant.

REDIRECT EXAMINATION

(806)

Q. Mr. Davis, in computing the normal shrink, does that shrink include an averaging factor for those variances that you have mentioned?

MR. SELVA: We object.

THE COURT: Overrule the objection.

MR. GOLDMAN: What is your answer?

A. I would say definitely yes. I mean the percentage that I set forth take into consideration the variations that he mentioned. Space, humidity, opening, and closing doors, or the temperature factors, or the other factors he mentioned.

Q. Mr. Davis, if hogs are close together, is there more or less shrink than if they are farther apart?

A. After the hog is once chilled to the proper temperature, then that makes no difference, they have less shrink when they are moved closed together.

Q. Does it make any difference in packing plants whether the passageways are refrigerated, if the various rooms where the product is held are refrigerated?

A. No, because actually, as I see it, the product is in transit to a cooler, and it is only a matter of minutes while it is in the warm area before it hits the cooler.

(807)

Q. And if the humidity in the cooler is proper, does the circulation of air by fan adversely affect the shrink?

MR. SELVA: Objection.

THE COURT: Overruled.

A. I would say no, because with fans and the proper humidity, you get better circulation in the cooler, and you apply more moisture back to the product again.

ELLIOT SACHS — Direct

(902) A. That is right, because the question I asked Mr. Solomon and others — no. It was Mr. Solomon at that time. Whether that condition and others which I had observed, were the same at that time as well as during the claim period.

Q. And what did he say as to whether or not the conditions you have described were the same when you saw them as they had been during 1948, 1949 and 1950?

A. As I recall, he said they were the same.

* * *

PROCEEDINGS

(915)

MR. GOLDMAN: Your Honor, earlier in the case defense counsel asked for information concerning dressed weights, dressed hog shipments. We have made somewhat of a search. It involves going through several hundred thousands of invoices and they came up with about 6 million pounds and I may say, if opposing counsel wish to send Mr. Sachs out or anyone else, to go through that tremendous amount of invoices, they may do so to dig up the rest of it. Here they are. Do you want to look at this, Mr. Pickrel?

MR. PICKREL: Not right now. Thank you.

* * *

(1124-5)

MR. GOLDMAN: Now, do you want those invoices? There are about six million pounds of dressed hogs that we fished out from among several hundred thousand invoices. You asked about dressed hogs the other day.

MR. PICKREL: May it please the Court, may I inquire as to whether or not counsel remember as far back as when this case started and when Mr. Smith was the first witness, and then is when we asked for them.

MR. GOLDMAN: I offered these the other day and Mr. Pickrel said he wasn't interested. Now, I am offering them again.

PROCEEDINGS

Legal Argument to the Court by Counsel for Plaintiff at Conclusion of all the Evidence

(4 Supp.) He (Harris) also testified that he observed other employees daily — every day some employees taking stauff for personal use; the fresh pork and sausage items; that they put it in their pockets. Mr. Harris didn't say in his testimony anything about capacious purses. That is what I said in my opening statement. That is one of the statements apparently we did not establish, a capacious purse. Mr. Harris said boxes (pockets).

We have the testimony there of Harris that about one-third of the employees were engaged in that pilfering. So, we have direct testimony. It is a very difficult thing to get direct testimony of theft. There were detectives hired, as the evidence shows. They were never able to catch anybody. The supervisors were not able to catch anybody. When Mr. McConkey was around, nobody would steal anything. Nobody was caught except for a couple of people Mr. Beerman caught when he was there for a while, maybe being a little more alert than most people and being a little more suspicious as to their conduct. Up until the time that Harris was caught redhanded with the trash truck, they didn't actually catch anybody other than (5) these examples of small, petty pilfering.

So that, there is definite direct evident from which one could make a rough estimate of how much had been stolen over a period of time. It would not be exact. It would be an approximation only. The law does not require that once it has been established with the requisite degree of certainty that damage has occurred, it does not require one to establish the amount of the damage with exactness. An approximation is sufficient.

* * *

Proceedings

(27 Supp.) And, I may say at this point, I think we are limited to a total of $120,000. I will make that concession because we have shown only five identified employees, plus unidentifiable employees, as a group who are involved in the theft. Under the terms of the bond we are entitled only to $20,000 maximum for each instance. And since the bond says "acting alone or in collusion with others", it is not our obligation to show how much each individual stole.

* * *

By the Court

* * *

(39 Supp.) So, the ruling of the Court, so far as the inventory shortages is concerned, that it shall not be submitted to the jury for the jury's consideration in arriving at any damages for the plaintiff.

Secondly, the Court will not submit to the jury any question upon the matter of damages for loss sustained by unidentified employees for there is no basis upon which such a determination could be made.

* * *

(42 Supp.) The exhibits, too, I think should be separated and only those exhibits that would have a bearing on the case, aside from the matter of the inventory shortage should go to the jury.

Of course, the arguments will be limited to the issues which I have indicated are proper to go to the jury.

* * *

Excerpts from Legal Argument to the Court at the Close of the Evidence

* * *

(1134) MR. PICKREL: On behalf of the defendant, we ask the Court to prepare and submit to the jury a special

Excerpts from Legal Argument to the Court at Close of Evidence

verdict in which they shall be required to outline the dates on which the alleged wrongful acts of dishonesty occured. What, if any, of the three meat products involved in this case, were in any such dishonest acts, and the value of the same?

We ask this so that this Court may know upon what the jury based its opinion and finding.

* * *

(45 Supp.) MR. GOLDMAN: I would object to a special verdict of the character stated by Mr. Pickrel because it requires details beyond the requirements of the policy.

* * *

Excerpt from Closing Argument of Mr. Pickrel

(1173) Then they (1174) also say to you in addition to Willie Harris, whom we had arrested, and James Jackson, whom we had arrested, three other people are mentioned. They are just mentioned; Willie Harris mentions them; Helen Hurt. Well, now, he mentioned her, therefore, they want you to guess what Helen Hurt did. You wouldn't know Helen Hurt if she would walk through this room. I wouldn't either. They got her statement. We have never seen it. That is, you haven't seen it, but they got it. We know. We have seen it. Wanted them to put it in, but they didn't put it in.

They got Robert Maiden's statement. Haven't heard anything about that. Both live here in Dayton. They could have subpoenaed them and let them tell their dreadful tale, if they had a dreadful tale. But I guess they didn't have a dreadful tale.

United States Court of Appeals

For the Sixth Circuit

THE SUCHER PACKING CO.,
Appellant.

vs.

MANUFACTURERS CASUALTY INSURANCE COMPANY,
Appellee.

SPECIAL REHEARING APPENDIX

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EXCERPTS FROM TRIAL MEMORANDUM OF PLAINTIFF

(1) It is the claim of the plaintiff that five known employes and a number of unknown employes have, through larceny, theft, wrongful abstraction, willful application, or other dishonest or fraudulent acts, acting alone or in collusion with others, taken meat products of the plaintiff, to plaintiff's loss in the amount prayed for in the Second Amended Complaint. It is the contention of the plaintiff that the loss was caused by the dishonest and fraudulent acts of the employes involved, and the amount of the loss is shown by the computation of the net so-called "excess shrinkage" computed from its weekly product analysis sheets for the 47-week period ending October 22, 1949 and the 45-week period ending September 11, 1950. The loss is, strictly speaking, not necessarily an inventory shortage. The loss is a disappearance of product from the plaintiff's premises, which, in the presentation of the evidence, the plaintiff measures by its records in the form of the weekly product analysis sheets and supporting data and other related records of the plaintiff company. It is true that if the product had not disappeared, it would have been in the plaintiff's inventory at one time or (2) another. The loss in this case is somewhat different from the ordinary inventory shortage type of claim where the shortage appears in the inventory alone and is so computed. As shown from the testimony of Mr. Hawk and Mr. Smith, already in the record, and as will also be shown by the testimony of Mr. Hadler, another certified public accountant, and other witnesses, while the weekly inventories are used in computation of excess shrinkage which represents the product which disappeared through dishonesty of employes, any errors in the intermediate inventories of either of the two periods involved are of no consequence at all, as they are self-correcting and cancel each other out, and the only errors in inventory

which could affect the computation for the total period of either of the two periods, would be the first and last inventories in the respective period, but, as further testified by Mr. Hawk, and as will be discussed by other and expert witnesses, in view of the tremendous flow of product through the plant during the periods in question, compared to the amount of the opening and closing inventories of the period, any errors in those inventories do not materially affect the computation of the total excess shrinkage for the entire period. The reason we mention these facts is to distinguish the present case from the case of the ordinary inventory shortage claim.

In the present case, although the insurance policy was effective November 1, 1947, for a three-year period, and although the plaintiff lost very large sums through the dishonesty of employes prior to the beginning of the 47-week period ending October 22, 1949, unfortunately the plaintiff does not have adequate records to support the amount of the loss prior to the (3) beginning of that 47-week period. Also, the plaintiff's record for the week intervening between October 22, 1949 and October 29, 1949, could not be located when plaintiff employed the auditors to make the computation of the excess shrinkage. Indeed, this one week's record can still not be located.

The auditors then also computed the excess shrinkage for the 48-week period ending September 30, 1950. The one ring of thieves, in which William Harris and James Jackson were involved, was apprehended on September 11, 1950, and while there probably were thefts by others after September 11, 1950, plaintiff has no direct evidence of such thefts and therefore is not claiming any loss after that date. Consequently, it has adjusted the claim in the Second Amended Complaint by subtracting 3/48 of the excess shrinkage of the 48-week period ending September 30, 1950,

the 3/48 representing the approximately three weeks between September 11, 1950 and September 30, 1950.

The auditors chose September 30, 1950 as the ending date for their computation of the second period, because, it being the end of the month, the figures could be more easily tied in with plaintiff's ledger and journal. Thus, in the present case, while under the terms of the policy the plaintiff would be entitled to claim losses beginning November 1, 1947, it has adequate records to establish those losses only for the 47-week period ending October 22, 1949, and for the 48-week period ending September 30, 1950 adjusted back to September 11, 1950.

In addition to the record information which establishes a disappearance of product which cannot be explained by any honest or business cause, the plaintiff in this case fortunately has direct evidence of theft. The witness, William Harris, who (4) was caught with a load of meat, stolen from the plaintiff's plant, concealed under rubbish in the trash truck of which he was the driver at the time, was convicted of grand larceny for stealing from the plaintiff. James Jackson also pleaded guilty and was convicted of grand larceny in connection with theft from the plaintiff. William Harris, having served his sentence, apparently is willing to make a clean breast of the entire matter, and he testified that he had worked at the Sucher Packing Co. fairly steadily, but not continuously, from 1948 until the time he was apprehended, and that he worked first as a laborer around the plant, and for the last three weeks as driver of the trash truck; that for a period of two years, at the instigation of Jackson, he and Jackson and Robert Maiden and Helen Hurt, other employes of the plaintiff, were engaged in almost daily stealing from the Sucher Packing Co. by loading up trash barrels with various fresh and smoked pork products, concealing them under trash and having them hauled

away on the trash trucks, thereafter selling them to various persons. Harris testified that from 4 to 5, to 8 to 10 barrels of meat per day were hauled away in that manner; that his share of the proceeds, when he helped load the products, was $15.00 to $18.00 per day, and when he was driver, from $50.00 to $70.00 per day. He testified that the employe, Willie Early, was involved in the ring for only a short period; that there were taken up to a dozen hams per barrel, and from 18 to 20 sides of bacon per barrel. He also testified that other employes of the Sucher Packing Co. were stealing daily, small quantities of meat, each, for personal use, consisting of fresh pork or sausage, and he estimated that almost a third of the employes were engaged in such thefts. This testimony would account for far (5) more of the disappearance of meat from the Sucher plant than plaintiff is claiming in this case. Actually, in plaintiff's computation of excess shrinkage, the figures are very conservative, as plaintiff made an extra allowance for normal shrinkage which was more than actual experience required, in order to be sure that the claim could not justifiably be criticized.

(Here follows citations and discussion of cases.)

* * *

"(9) In the foregoing citations, we have included those in which the interpretation of the use of the word "conclusive" or "conclusively" is used in a policy to describe the proof required, as the defendant will probably claim in the present case that plaintiff is claiming an inventory shortage. As pointed out above, actually plaintiff is not claiming an inventory shortage as such, but is using its records simply to establish the amount of loss caused by theft and dishonesty of its employes, of which there is direct evidence in the record. In any event, as shown by the cases, even if this

were a claim of an inventory shortage, the word "conclusive" must be given a reasonable construction.

Also, the cases cited show that the plaintiff in this case has a much stronger case than can usually be found where a claimant seeks to recover for losses arising out of disappearance of property claimed to be due to dishonesty of employes.

SUPPLEMENTAL TRIAL MEMORANDUM ON SUBJECT OF AMOUNT OF DAMAGES

(1) As indicated in plaintiff's original trial memorandum, plaintiff does not necessarily rely on the summary of the excess shrinkage and the loss in money by reason thereof, taken from the weekly product analysis sheets as shown on Mr. Hadler's computation (plaintiff's Exhibit 6, as modified by plaintiff's exhibits 21 and 22), but the book records and computation summarized on those exhibits, backed up by the product analysis sheets and the file of documents for each week in support thereof were offered rather as corroborating evidence of the direct testimony of theft given by William Harris.

Harris testified that beginning sometime in 1948 he became connected with the ring which was then already in operation, the other members of the ring at the time being Jackson, Maiden and Hurt; that this ring, through the loading of meat into barrels, which were then placed in trash trucks and thus removed from the premises, stole from 4 to 8 barrels of meat a day almost every day; and that for a short period before the ring was caught, a fifth employe, Willie Early, joined the ring. Harris testified that the ring stole fresh and smoked pork, consisting of shoulders, bacons and hams. He also stated that in addition to thefts by the ring, there was fresh pork, smoked pork and sausage stolen

by other employes of the company for personal use, by placing the same in their pockets; that such was a daily occurrence; and (2) that almost one-third of the other employes were involved in that type of pilferage for personal use. Harris also testified that in the barrels taken out, there would be from 5 to 10 hams, depending on the size, and from 20 to 25 sides of bacon; and as to shoulders, one could easily estimate the equivalent quantity of shoulders. From the estimated weights of such quantities of meat given by Mr. Smith in his testimony, one could compute the approximate amount of meat stolen by the ring during the period in question; and from the average wholesale sales price which was the value of the property stolen, the jury could then arrive at a figure for the amount of the loss due to the activities of the ring, without any other testimony.

It is evident that under Harris' testimony, proof that loss did occur is definite and certain, the amount of the loss, from his testimony alone, being the only matter that is not certain. However, under the law, hereinafter cited, all that the jury need have is some basis for reasonable inference as to the extent of the damage. The amount of loss need not be proved with certainty or exactitude.

Accordingly, in the present case, the Hadler computations and the weekly analysis sheets with supporting data are submitted to the jury, not necessarily for the purpose of proving that the loss occurred, because that had already been proved by Harris' testimony, but for providing the jury with information which they may choose to use, or not, as they see fit, and only to such an extent as they may see fit, as assistance to them in arriving at the amount of loss. If the plaintiff's witnesses are to be believed (and plaintiff has a right to assume that the jury will believe them) there is nothing indefinite or uncertain about the loss as shown by the computations.

Supplemental Trial Memorandum on Subject of Amount of Damages

Plaintiff's witnesses stated that while the question of so-called normal shrinkage is subject to some variation, the total (3) of 3½% allowed by the plaintiff for fresh pork and the other percentages for smoked pork and sausage are outside maximum figures, beyond which any variation would not go, and that actually the normal shrinks were less than the percentages allowed. For example, the plaintiff's witnesses have testified that 3% for fresh pork is more than enough to take care of normal shrink from hot weight to sale, including the initial chill shrink, any cutting shrink, and any shrink thereafter before sale, but that, to be conservative, and so that the defendant could not reasonably object to the amount, an additional half-percent was allowed for purposes of the claim. Similarly, with respect to the normal shrinkage figures given for the other items in the claim. The Court will recall that according to the testimony of Mr. Davis, plaintiff's outside expert, the amount of normal shrink allowed by plaintiff for sausage in the various categories was approximately double that used and found to be accurate in the industry. In light of this testimony, any variations that might occur in normal shrink cannot affect the amount of plaintiff's claim, as the amounts allowed were beyond the maximum of such variations.

The defendant spent a great deal of time in cross-examination, to show that intervening inventories may not have been accurate, and that even the opening and closing inventories of one period and the closing inventory of the other period may not have been accurate; and has also attempted to show that some of the transfers to cure were approximations only, and subject to possible error.

Plaintiff's witnesses, however, have stated, and it is a matter of mathematical certainty, that any errors in intervening inventories are completely washed out and make no difference whatever to the final result; also that, while pos-

sible errors in opening and closing inventories would affect the final result, in the light of the comparative insignificance of those inventories when compared to the total product going through the plant during (4) the periods, any possible errors in those inventories would likewise be insignificant in their effect on the computation of the total loss.

Also, plaintiff's witnesses have testified that the figures on transfers to cure, although sometimes given in round numbers, are nevertheless accurate; that the round numbers, for the most part, represent variations of 5 pounds or less, and that in practice there are just as many overs as unders, so that those slight variations balance out. After all, the plaintiff's witnesses, as experienced people in the industry, have a right to give the jury the benefit of their experience and their judgments and estimates of the accuracy of the method used.

It is true, the jury is not obligated to accept their testimony, and may, instead, accept the defendant's arguments that the figures are unreliable. However, the jury certainly is not obligated to accept the defendant's arguments, but may, instead, choose to believe the plaintiff's witnesses. Under these circumstances, if the jury believes the plaintiff's witnesses, the computations are not uncertain or inaccurate, but are definite, certain and accurate, and any margin of error affecting the total result is so insignificant as to be inconsequential; that, indeed, if there is any error in the computation, it is on the side of conservatism because of the over-generous percentages allowed for normal shrinkage.

Be that as it may, the claimed weaknesses in the methods used by the plaintiff have been called to the jury's attention, and the jury may, if it is so minded, choose to give greater effect to those alleged weaknesses than the plaintiff's witnesses say should be given; but the final conclusion as to

how reliable the methods are is for the jury to determine. This does not involve speculation on the part of the jury at all. It involves reasoned inferences on their part from the testimony. The testimony of the (5) plaintiff's witnesses has been definite and certain. The defense has brought out what it claims to be possible weaknesses in the plaintiff's system. The jury will have to consider the conflicting claims with respect to the reliability of the system, and come to its own conclusions with respect thereto.

It is also claimed by the defense that the excess shrinkages and resultant loss figures have three possible explanations:

(1) An understatement of the normal shrinkage factors;
(2) Errors in the figures;
(3) Theft.

1. We have already disposed of the claim of the possible understatement of the shrinkage factors. According to the plaintiff's witnesses, more than the maximum amount of normal shrinkages that could have occurred have been allowed for purposes of the claim.

2. While the defendant claims that there may have been errors by reason of the number of employes involved in gathering the figures together and making up the final result, there has been no showing that any errors were made on their part, and when any figures are audited, there is no margin for error allowed. Where money is figured, it must come out to the penny, and until the contrary is shown, plaintiff has a right to assert that all figures were entered correctly and copied correctly. Indeed, the testimony of Mr. Solomon is that whenever any large shrinkage figure occurred, everything was rechecked, and if there were any errors, they were corrected. Both he and Mr. Sm[illegible] testified that the figures as presented were correct. Mr. Hadler testified that although he did not audit the figures, he and

his firm had checked the system and occasionally checked the analysis sheets as part of their regular auditing consulting service, and that he had no reason to believe that the figures were not correct. Consequently, the jury has the right to believe the plaintiff's witnesses, that the figures are correct, and so far there has been no showing that the figures are incorrect in any manner.

(6) 3. Consequently, this leaves only the third possible explanation, to-wit, *theft*.

However, as stated earlier, we do not rely on the figures to prove the fact of theft, even though we would be justified in so doing. In this case we have direct evidence of theft by one of the criminal participants therein, and, therefore, do not need the figures to prove the fact of the theft, even though we would be justified in so doing, if necessary. The figures are simply submitted so as to help the jury if they wish to use the figures, and if they believe the plaintiff's witnesses, in arriving at what they believe to be the amount of the plaintiff's loss from theft.

Even if the figures submitted by the plaintiff would be considered as being somewhat uncertain (which we contend is not the case, if plaintiff's witnesses are to be believed), even under those circumstances such fact would not affect the plaintiff's right to have the figures considered by the jury.

A distinction is made in the law between the character of the proof required to prove that damage has occurred, and that required to establish the amount of damage. The rule that one may not recover remote, uncertain or speculative damages, has to do with the character of the proof that damage did occur. If a party can prove with a reasonable degree of certainty that damage did occur, all that the jury then needs is some basis from which reasonable

inferences may be drawn as to the amount of damage, even though the proof offered is uncertain as to amount.

In *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, the famous "portal to portal" pay case, there were no records to prove the amount of time involved by the employe in his portal to portal activities. The Court said, at page 688:

> " * * * the employer having received the benefit of such work, cannot object to the payment for the work on the most accurate basis possible under the circumstances. (7) Nor is such a result to be condemned by the rule that precludes the recovery of uncertain and speculative damages. That rule applies only to situations where the fact of damages is itself uncertain, but here we are assuming that the employe has proved that he has performed work and has not been paid in accordance with the statute. The damage is therefore certain." (In the case at bar we have proved through the testimony of Harris that the thefts have occurred) "The uncertainty lies only in the amount of damages * * *. It is enough, under these circumstances, if there is a basis for a reasonable inference as to the extent of the damages."

In the case at bar, if one were to add up the average of barrels per day which Harris says were stolen, for the period of time until he was caught, and multiply that by the amounts and the value thereof, it is easy to see that one would come out with a much larger figure than plaintiff is claiming, even without allowing anything for the pilfering for personal use which Harris said was also a daily occurrence, and in which approximately one-third of all the employes participated. The computation which plaintiff has offered from the product analysis sheets, simply furnishes corroborating data which the jury, depending on how much credit they give to plaintiff's witnesses, can use as a

basis for making a reasonable inference as to the extent of the damage.

(Here follows citation and discussion of many cases.)

* * *

(12) In the case at bar, the defendant, by its policy, in effect agreed to indemnify the plaintiff against loss within the limits of the policy caused to the plaintiff through the theft, etc., or other dishonesty of its employes. There is nothing in the policy that requires the insured to be able to identify by number of pieces or other specific identification, the actual pieces of meat that were stolen or wrongfully abstracted or misappropriated. There is no such requirement in the policy. The policy in Insuring Agreement I, agrees to indemnify the plaintiff "for all loss sustained during the policy period * * * through larceny, theft, embezzlement, forgery, misappropriations, wrongful abstraction, willful misapplication, or other dishonest or fraudulent act or acts committed anywhere by any of the Employes acting alone or in collusion with others, including loss of money and securities and other property through any such act or acts of any of the Employes * * * ".

The testimony of William Harris establishes that the plaintiff did suffer loss through the larceny, theft, misappropriation, wrongful abstraction, willful misapplication of its property by Harris and three of the other members of the ring in substantial quantities almost every day for almost two years, during which Harris was a member of the ring and for a shorter period involving the fifth member. Each member of the ring, under the terms of the policy, since he acted in collusion with others, was covered to the full extent of $20,000.00, or to the extent of $100,000.00 in all, if the loss was that great, and in addition thereto, the unidentifiable employes who daily pilfered for

personal use were covered to the full limit of the coverage of (13) unidentifiable employes in the amount of $20,000.00. This assumes, of course, that the jury will find that the total loss to plaintiff from the dishonesty of the identified and the unidentifiable employes was at least $120,000.00 To the extent that the jury may not accept the testimony of plaintiff's witnesses at face value, and to the extent that the jury may give little weight to the plaintiff's evidence, the jury may find the loss less than $120,000.00.

However, from the long list of cases above cited, the doctrine is firmly established that even if it be considered that the production analysis sheets and the computations made therefrom, contrary to the assertions of plaintiff's witnesses, do involve uncertainties, such possible uncertainties do not deprive the plaintiff of the right to have such evidence considered by the jury as an aid, to the extent that the jury wishes to use the same to determine the amount of plaintiff's loss, since the fact of plaintiff's loss has been established by the direct evidence from William Harris. The weight to be given the testimony and evidence offered by plaintiff's witnesses, of course, is for the jury to determine.

Excerpt from Original Transcript

(843) MR. GOLDMAN: Since the jury has retired, your Honor requested me to furnish authority on the subject of Merica's statement, that Jackson told him he had been stealing from the Sucher Packing Company for five years, as a declaration against interest. I have written down the cases and given them to your Honor's law clerk. I met him over in the law library and he brought some books over with him. I can present that at this time, if your Honor wishes.

* * * *

Excerpt from Original Transcript

(844) THE COURT: That is the statement you would have Mr. Merica testify that Mr. Jackson said to him that he had been stealing from the Sucher Packing Company for five years?

MR. GOLDMAN: Yes, your Honor. Shall I proceed (845) on the law?

* * * *

SECOND SUPPLEMENTAL TRANSCRIPT

Colloquy Between Court and Counsel and Argument of Plaintiff's Counsel

* * * *

(3) THE COURT: Do you have a case to the effect that the declaration of a witness other than the party may be given as adverse?

MR. GOLDMAN: If it affects his pecuniary interest?

THE COURT: Well, a case, do you have one?

MR. GOLDMAN: Well, I think —

THE COURT: The text of Ohio Jurisprudence is no law.

MR. GOLDMAN. I grant you that.

THE COURT: Unless it is backed up by a decision.

MR. GOLDMAN: I think what I had better do, since I don't have much time and I didn't have a library available to me last evening, my statement was made, you know, on my conception of what the law is on the declarations against interest. When we get out of court, the Law Library is closed. I know it to be the law. I am sure cases can be found that say declarations against persons, pecuniary, when made, may be used as exception to the hearsay rule. Under the old law it used to be if he were dead or unavailable.

The Ohio Jurisprudence says while it may have been. In that case it was a party. Apparently they have abandoned that condition. (4) But I submit even if the old rule were still the law, that is, if the declarant had to be either dead or unavailable, when a man pleads the Fifth Amendment he is unavailable as a witness, you can't make him testify.

THE COURT: Give me what you have in the way of decisions.

MR. GOLDMAN: On the subject that a person making a decision against interest may be used under the hearsay rule?

THE COURT: I don't mean that, but what I mean is a case that holds that it is an exception to the hearsay rule to permit someone to testify what a witness said is contrary to his —

MR. GOLDMAN: Proprietary interest?

THE COURT: Well—

MR. GOLDMAN: That is what the rule used to be. It had to be against his proprietary interest.

THE COURT: I know that is true with reference to a party.

MR. GOLDMAN: I am confident I can get your Honor a number of cases that will say that the witness has to be unavailable himself, out of the jurisdiction or deceased, and I see in this case where a man claims the Fifth Amendment it is just as good.

* * * *

(9) MR. GOLDMAN: Yes, your Honor. Shall I proceed on the law?

In the case of Citizens National Bank — I may say the basis for the admission is, this is a declaration against interest on the part of Mr. Jackson and as such is admissible because he is unavailable as a witness, in view of his claim-

ing the Fifth Amendment, just as if he wasn't here. And even though he was not a party, a declaration against interest may be used particularly a pecuniary interest.

In the case of Citizens National Bank vs. Santa Rita Hotel Co., 22 Fed. (2nd) 524, there was a suit by a bank against a hotel company with reference to some stock that had been pledged to the bank. The bank wanted it transferred to the bank after it was foreclosed on the pledge. The hotel company claimed that the stock was invalid as a forgery and produced testimony that at an earlier period a person who had been secretary of the corporation for which the stock had supposedly been issued admitted having forged the certificates or declared he had forged the certificates.

The circuit court of appeals held it was properly admitted, that even though the secretary was not a party to the case, the secretary was dead at the time, he was unavail- (10) able, that this declaration was against the interest of the secretary because it subjected him to civil liability and also criminal liability. It is a case almost exactly like the situation here.

In addition there are two cases, (Sutter vs. Easterly, name omitted by Court Reporter) 354 Mo. 282 and 189 S. W. (2d) 284. That was an actual Fifth Amendment case just like this one. In that case there was a suit to set aside a judgment on the ground it was procuring a verdict, because the attorney for the prevailing party had procured perjured testimony.

During the course of the suit they produced the statement that had been given by the witness in the trial of the case on the merits wherein he declared that his testimony was perjurious. He did not see the accident and that he hatched it up with the lawyer. It was objected to on the ground it was hearsay and the witness was called to

testify in the trial and refused to testify on the ground it might incriminate him, a Fifth Amendment case.

The court said the testimony was properly admissible, that the statement made outside of court to a third party on the ground it was a declaration against his interest, very much so, because it would have subjected him to financial — the court said it was not necessary to discuss his pecuniary discharge but certainly would subject him to something more serious that that, and the basis of the exception (11) to the hearsay rule is that no one will make a declaration against his own pecuniary or in this case interest of liberty and make it false, that therefore it is an exception to the hearsay rule.

The third case, Weber v. Chicago Ry. Co., 175 Ia. 358, 151 N.W. 852, was again a similar case. A railroad was sued because of an accident and it attempted to defend by introducing a statement of a person who admitted he caused the wreck. During the pendency of the case the individual had been convicted of wrecking the train, similar to Jackson here, who was convicted. Subsequently, however, the conviction was set aside on the grounds of insanity. A while before he was declared insane he was released from prison and they attempted to take his deposition and he refused to testify on constitutional grounds. After he was released to an insane hospital, he then was released as being harmless and could not be found at the time of the trial, but his deposition, such as it was, which constituted a refusal to answer was available, and the court there also said that his statement made outside of court, his declaration to third parties, was admissible in evidence because it was very much against his interest, pecuniary as well as interest of his liberty.

Then the case of Halvorsen v. Moon & Kerr Lumber Co., 87 Minn. 18, 91 N.W. 28, the owner of a building sued the

owner of an adjacent building for having been responsible for fire to his (12) building. The contention was that the building next door caught fire and spread to the plaintiff's building causing it to burn down. The defendant attempted to produce evidence that a man in charge—happened to be meat there, too — had told someone that he had left the kitchen when the fire next door started and some kind of kettle boiled over which set the kitchen on fire, it spread to the rest of the building and burned down.

This testimony had been excluded by the lower court and the upper court held it should have been admitted because the admission of this, at least negligence on the part of the person was against his own pecuniary interest, he would have been subject to civil liability for his own negligence. He was not a party to the case; he was also unavailable as a witness at the time of the trial. I think he died.

In the case of Carpenter v. Carpenter, 153 Oregon 584, 56 Pacific (2nd) 305, a declaration of a party who was unavailable, who was alleged to have been the donor of certain property, the question was as to ownership and the declaration of donor showing he had made the gift and therefore no longer owned the property himself was held to be against his pecuniary interest and though not a party to the litigation was admissible as an exception to the hearsay rule.

In another case in Minnesota, in re Forsythe, 221 (13) Minn. 303, 22 N.W. (2nd) 19, a legatee under a will had made statements in derogation of the validity of the will, although he was not party to a subsequent suit involving the validity of the will, in the meantime died, his declaration was admitted as an exception, made outside of court, was admitted as an exception to the hearsay rule on the ground it was obviously against his pecuniary interest to

make a declaration which would invalidate what he might get and the court in that case said at page 54, — I am sorry, I don't have it. No. The case quotes Thayer on Evidence, at page 54, to this effect "The declarations made by a person (continues to quote to this point:) — where it appears they were against his pecuniary interest."

Finally the case of (Truelsch v. Northwestern Mutual Life Ins. Co. et al., name omitted by Court Reporter) 186 Wis. 239, 202 N.W. 352, where the question of the truth of certain statements made under a policy were brought into being and the party, the person making the statement not a party to the suit and involved a statement against his own financial interest, and the court held there again that that declaration, although made outside of court, against his pecuniary interest was admissible as an exception to the hearsay rule. He was unavailable as a witness.

I submit, therefore, that under these authorities since the declaration made by Jackson was not only against his own pecuniary interest, because he would be civilly liable (14) for his theft, but was also here even more likely to be true because under the theory of that exception to the hearsay rule, because no one is going to admit guilt of a crime, unless it is really true. Under these authorities, some of which are exactly in point and others are analagous, I submit the testimony should be admissible.

(In the transcript the court reporter did not always get the name of the cases cited in the foregoing argument.)

* * * *

(16) (The following is the argument of Mr. Goldman on motion to dismiss, which was omitted at the top of p. 846 of the transcript.)

MR. GOLDMAN: May it please the Court, at the outset I may say that I do not think opposing counsel have it within their power to plead our case for us. Our case is pleaded by the pleadings.

Argument of Plaintiff's Counsel at End of Plaintiff's Case

In the second amended complaint, in the original complaint, in the first amended complaint there was no reference to any inventory shortage, no reference to that being the basis of the claim, as such.

The second amended complaint complains that through the dishonesty, or it says, (Reads from second amended complaint) which is broken down into three categories, so much for fresh pork, so much for smoked pork and so much for sausage.

Now, it is our contention —

THE COURT: The opening of the paragraph from which you were reading "and including part of any inventory shortage".

MR. GOLDMAN: We are not claiming necessarily it would be an inventory shortage. That is the paragraph that states what the policy covers, the paragraph that simply states the policy covers. It is the paragraph beginning at the bottom of the page. The paragraph to which (17) your Honor has referred simply gives the contents of the policy.

THE COURT: Aren't you attempting to establish your loss by an inventory shortage?

MR. GOLDMAN: Not quite, your Honor. The theory of our case is this: We have direct evidence of theft. Now it is true that opposing counsel make light of Harris, his testimony. Naturally they would, because it hurts them. Harris testified that he worked for the Sucher Packing Company for a period, not every day—he didn't say he worked every day—for a period of several years prior to September 11, 1950 and beginning sometime in 1948. At the instigation of Jackson he began his participation in this thieving ring. Up until the time he was a driver, and he drove for the last several weeks of his employment, prior to that he was a laborer in and around the plant.

His testimony was that prior to that time what he did was help load barrels and fill them—top them off with trash and put them on the trash truck. He said this occurred almost every day; that he and Jackson and Maiden and Hurt were involved in it from the beginning, beginning in 1948; that Willie Early was only involved for a shorter period prior to the time they were caught. We have no record that Early worked there more than a short period.

It is true that Jackson's employment as what would (18) be called a regular employee, did not begin until July, 1950. Prior to that he was a day laborer. Mr. McConkey said he was working when he came as a day laborer. We were able to find one time card. He worked there at least in May of 1950, maybe earlier. McConkey said he was there when he came there in 1949. Harris' statement was that he worked there at least some time prior to the beginning of these thefts which he was connected with in 1948.

Now, in his confession which he was shown by Mr. Selva says, on September 11th he said he had been working there for three years. So, there is nothing inconsistent with the statements all along, and in his confession he was only interrogated concerning what had happened in the last three weeks when he was a driver.

Mr. Merica tells me when you want to get a confession, you try to get the man to put in writing something that will definitely assure you of a conviction. Of course, my knowledge of what Harris would say was based originally on what Mr. Merica told me. I confess there is some doubt in my mind whether he would testify, I didn't know; hoping he would.

Of course, in the case of Jackson, he refused to testify, although he had admitted. There again he admitted to Mr. Merica. — Of course, your Honor hasn't ruled on that fin-

ally—he had been stealing for five years. It shows (19) he was employed there for five years from the time the plant reopened in 1945.

Also, Harris' testimony was that they took anywhere from four to eight barrels a day and in the barrels they would have from—depending on the weights—hams from six to ten and from twenty to twenty-five bacons, and they also took shoulder butts, and the value of those is shown from the average prices for the same as appears on the exhibits. And actually we would not need to show the computations of excess shrinkage in this case to present to the jury sufficient for them to consider, to arrive at a verdict. They could take Harris' testimony and could compute and arrive at a figure of how much was taken and the value of it.

Now, Harris also said in addition to what part the ring took out that other employees, and he estimated that a third of the other employees were taking smaller amounts for personal use, sausage, chops and stuff of that sort, putting it in their pockets and leaving the plant with it. That is outside of the testimony of theft. That is not based on tickets; that is not based on speculation; that is not based on assumption; that is not based on inference. It is outside of evidence of theft.

This policy is supposed to protect the plaintiff and that is what it paid the premium for, dishonesty, and disappearance. Let us see those three cases.

(20) In the case of theft, there is nothing in the policy which says we have to say three hams, two shoulder butts; it doesn't say with what particularity we claim any particular items were stolen. Any amount which we could reasonably prove was stolen, we are entitled to recover the value of it, and we maintain that is the value of it.

* * * *

That is our contention that the jury, if we never put in Mr. Hadeler's sheets at all, if we didn't use the product analysis sheets at all, has enough evidence, except for the evidence of value, and Mr. Smith testified as to the approximate weights of the barrels, how many hams or bacons in it, so the jury would have a basis from which it could compute over a period of time an estimate of the amount of the loss.

(21) Now, the purpose of introducing the accounting testimony and the testimony of the product analysis sheets was for the purpose of assisting the jury in showing how much the loss really was.

It is true the jury doesn't have to believe Harris, although it is strange why a man—hard for me to conceive why anyone would take the witness stand and admit under oath he was involved in crimes for a period of several years for which he could be convicted and the only crime for which he was charged was the theft with which he was caught. The earlier thefts he wasn't charged. He ran the risk of conviction by his testimony. It is hard for me to believe that anyone would knowingly take the stand and under oath admit thefts for which he could go to prison again. It doesn't sound reasonable and I believe for that reason that his testimony is very credible.

They try to make fun of him, because it is true he is not a man of great intelligence. Perhaps if he were smart he would have claimed the Fifth Amendment too. Jackson is a little smarter. That is why he was no doubt the head of the ring, according to the testimony of Harris.

Although Jackson was convicted, the only reason he could have had for claiming the Fifth Amendment was he knew his conviction would not protect him for previous crimes for which he was not indicted. That is why he wouldn't (22) talk.

I submit that we have positive evidence, direct evidence, not inferences, but direct evidence of theft, and the approximate quantities of theft, that without any figures based on the product analysis sheets, there is ample evidence for the jury to arrive at a verdict.

Now, it is our contention that you see from the reading of the complaint that we have not claimed we are basing our claim on an inventory shortage. We cite the policy which includes that too. We said through larceny, theft, misappropriation, wrongful abstraction, other dishonest or fraudulent acts, of the employees, causing loss of property to the plaintiff.

THE COURT: How did you arrive at these amounts that you claim here?

MR. GOLDMAN: Well, I am saying your Honor, for the purpose of assisting, giving the jury some corroborating evidence of the amount, which they can disregard, if they wish, if they don't believe that the computations of Mr. Hadeler are reliable, they don't have to follow them.

THE COURT: If they accept the computations of Mr. Hadeler, that means they have accepted the inventory loss as a basis.

MR. GOLDMAN: Not necessarily. It may be and it could be actually that the amount of the theft is the same (23) as the inventory loss.

If Harris and his gang and individuals who stole, whom we could not identify, various employees taking stuff for personal use throughout the period, you couldn't identify them, – He said it was going on every day, almost a third of the employees were doing it – if we could total up the amounts they took, it should equal what is referred to as the inventory loss, or unexplained loss. Probably it is more because of the fact that we were over-generous in the allowance of so-called normal shrinkage. There shouldn't be

that much shrinkage, but to be on the conservative side we allowed more normal shrinkage for the purpose of computing the claim than ordinarily occurs.

So, actually, were we able now to go back and find every piece that was taken by this gang and by the unidentified group, they would probably total more than what is called unexplained loss. Naturally, as far as Mr. Hadeler is concerned, it was not up to him to subscribe the reason for the loss.

* * * *

(24) MR. GOLDMAN: So, it is our position that we used the figures simply as corroboration. Now, if we didn't have the figures, the jury would have to make their estimate as best they could, based on the direct evidence and arrive at the amount; figure out the average number of barrels a day, average weight, price and come up with a figure. However, I think that they are given great assistance by what I will refer to as Mr. Hadeler's computations, and I don't agree at all with the view that those figures are speculative.

Of course, if one doesn't believe the testimony of the plaintiff's witnesses, then they are speculative. But for the purposes of the plaintiff's point of view, it has the right to consider that the jury will believe the plaintiff's witnesses.

The attacks made on the product analysis sheets are that the intermediate and even opening and closing inventories may be inaccurate. There is testimony in the case and the jury has a right to believe it, and I think it is mathematically necessary that the intervening inventories make no difference whatever, the only inventories that have an effect on the total computation are the opening and closing inventories.

We have the testimony of Mr. Hawk, who has been a certified public accountant in practice since 1928, that

in view of the large volume of product which flowed through the (25) plant in those 47 and 48 week periods, that any conceivable error in inventory of the opening and closing inventory would become very minor and insignificant. It would affect it but it would be insignificant in the total result. As an expert he has given that opinion and the jury has a right to accept that.

There has been comment, derogatory comment that the product analysis sheet and the supporting data for the week ending October 29, 1949 is not here. It is missing. We would like to have it. It would certainly make our case a lot better, if we did. At least, it would take a lot of the steam out of the defendant's contentions, if we could produce that week's record, too, so as to have a complete period which ended on a fiscal year inventory. We can produce the fiscal year inventory by taking the beginning inventory of the week ending November 5th. However, that inventory would be used for the earlier period because we don't have the transfers for the week ending October 29, 1949. And that is the only reason we can't use the closing inventory. We have the closing inventory for that week because it is the same as the opening for the week that we do have. But we can't use the closing inventory because we don't have the transfers. So, we are left with having to use the closing inventory for the week of October 22nd.

Now, the jury has a right to believe, has to (26) believe that the intervening inventories make no difference because that is mathematical. I think we would be entitled to instruction by the Court that it is a mathematical certainty, no other answer is possible, as far as intermediate inventories are concerned, and as to the opening and closing the jury has a right to believe Mr. Hawk, believe our witnesses, any other witnesses, that any error in this would

have a very minor effect in the total outcome. It hasn't been shown there was an error in there.

As far as our witnesses have stated they have stated to the best of their knowledge the inventories are correct, but they do agree that the intermediate ones and any but the fiscal ones might be incorrect, because in some particulars they are based on estimates instead of actual weights. So I submit there is nothing to this point as to the inventories destroying the value of the computation.

A to the transfers the testimony has been by Mr. McConkey and Mr. Smith that this is not strictly guess work when they put them in the vats. They are designed to hold 1400 or 1500 or 1600. They are very large. Mr. Pickrel is right when he said they would have to be almost as big as that table. I think probably some of them are. They are weighed before that, but when the weight is such that they are one ham over or under, the amount that goes in, if it is 1405 or 1395, they round it off at 1400. If it is more (27) than that, they take a ham off. If it is less than that, they add a ham to it or a bacon, as the case may be. And after all, these people are very experienced in the business and Mr. Davis who has made analyses in many places, when he was asked about it, I believe he said these experienced people can tell, they become very good at it, in the grading of the hams and bacons as to the weight that is used for the purposes of the transfer.

Mr. Pickrel and Mr. Selva, of course, part of their job is to — at least I look at it that way — to throw dust in the jurymen's eyes, if I may quote from Gilbert and Sullivan. All that cross-examination was the purpose of muddying up the facts.

The grading of the hams and bacons into the various sizes has only to do with putting them in certain classifications, and it has nothing to do with establishing the weight

which is charged or credited to fresh pork and cure, when they go from fresh pork to cure, because after they are cured they are weighed.

So, the two kinds of weight, the curing weight—every ham is not cured. Men become experienced and know that a certain size is 10 to 12 or 12 to 14. But that is not the weight that is used for arriving at the figures. That is simply for the purpose of classifying them. Just by giving it a number – They could call it Joe or John, or (28) Class A and B. After they are graded, they are put into trucks and weighed and transferred from the trucks to the vats. They know how much to put in. These vats hold approximately fourteen, as the case may be. If the actual weight turns out to be a little over or under that which they have for the actual weights, they put in the round figure, and from experience they find the overs balance the unders.

Now, the jury does not have to believe that testimony, I grant you that. The jury could believe that they did the thing helter-skelter, didn't follow any accurate system. But the jury has a right to believe our witnesses. I think they are credible. I think the jury should believe them, and according to our witnesses, this is an accurate method.

Now, if the transfers are accurate, the statement also is that the purchases and the – They start off with the dressed weight, which is taken from actual scale tapes, not weight, and they subtract three percent of that in advance to take care of the shrink, or the normal shrink, and those weights are recorded.

Now, there is no presumption in law that clerks make errors, while, of course, it is possible, any record is subject to that possibility? but there has been no evidence that there were errors by the clerks in recording these weights or in recording any of the figures. If that (29) were the

case, every accounting firm, when they tried to balance books for a company would say, "Well, we will have to allow so much for error." We don't allow a penny for error. There is no assumption for error. It is not fair to assume there was error here. There may have been. Until it is shown, you can't assume that there was.

I submit the only error that was acknowledged as probable, in some cases they would come up with gains, undue gains. One thing I ought to bring to the Court's attention is that sometimes an apparent gain is not a real gain, because three percent, if it doesn't shrink that much, there will be an apparent gain, and from the testimony there might not be actually three percent in the shrink, so there should be every week after really a slight gain, assuming everybody was honest.

Mr. Hadeler did not testify that in his computation that the loss was caused by errors, by miscalculation, normal shrink or by theft. He said it could be if there were errors or if that was wrong, those could be guesses. But there has been no showing that there were errors. Until it is shown there were errors, no one has the right to assume there were.

As far as miscalculation of the normal shrink, there is no testimony that it was more than generous. We allow 3½ percent on the fresh pork. We allow 1½ on the smoked. Based on Mr. Davis' figures from being in the business seven (30) years and having examined balances and checked balances all over the country, his figures are less than our figures. On sausage particularly, where we allow five percent for certain classifications, he allows only 3½ or 2 percent. He says three percent is more than adequate to cover all shrinkages. They made actual tests at Suchers. This was not guess work. Now they try to make light of his statements on the basis "Where are the records?" There

is no point in keeping records. It is for their own information to know what the shrink is. A few months later makes another one to see if it is still the same and it has been the same. No occasion to keep a permanent record of it.

As to the shrinks in the other categories, the evidence is all one way. The percentage we allowed is more than adequate to cover what would occur through normal business practices.

Now they talk about the various things that could effect shrink, the humidity of the temperature. There is no evidence that they were not properly controlled in this case.

MR. SELVA: Is there any evidence at all in this case?

MR. GOLDMAN: Please don't interrupt. Of course, there was. The evidence was proffered as to the conditions (31) at Suchers with respect to shrink. I think your Honor ruled it out. I proffered the testimony of Mr. Smith on the subject that there was nothing in the manner in which the product was handled at Suchers that would cause any excess shrink.

The testimony of Mr. Smith is that the product went out in very short order. There was no evidence that the product stood longer than the normal period, which would cause any additional shrink.

Mr. Davis testified he took into account in giving his figures for shrinkage these various factors which average out. You have to take an average. On some animals you may have a much smaller shrink. That is your average shrink. When you figure the tremendous quantity of hogs processed at Suchers statistically there isn't any question that is the proper way to do it.

A lot of this talk by opposing counsel is simply surmise on their part; something they would like to be able to

prove and find. They would like to be able to prove that the temperatures were not right. There is no evidence that they were not. Our testimony is that they were, and the jury has a right to believe it. We take the view and I think your Honor will agree that the plaintiff has a right to expect that the jury will believe his witnesses – their witnesses' testimony, otherwise they would not have put them (32) on the stand, and from the point of view of this motion, it must be assumed that the jury will believe the testimony. And I say that even if we did not have this direct testimony of theft, we do have the evidence from our witnesses which explains every possible avenue where that product could have gone.

There is a complete accounting for it and the only remaining answer they say – They have eliminated the possibility of error by saying the error is not there. They have eliminated the possibility that the shrink without theft was greater than stated by saying it was not greater than stated, that the normal shrink was less than 3½ percent, and the only remaining possibility is dishonesty. Now, the jury has a right to conclude that.

I think in one case a fairly recent case, decided in our federal courts, Retail Stores vs. Hartford, 111 Fed. Supp., 772, an insurance company was sued on a similar policy there. In fact, the language in the policy was practically identical to the language in the present policy. And all they could show in that case was – they had no direct evidence of theft whatever – They showed that they came up in an inventory with a lot of merchandise missing. In that case they also had a shrink factor. They had an estimated shrink due to customer stealing. It was a retail store and they found from experience that customers shoplifted a (33) certain percent every year and by experience they knew pretty definitely how much that was and cer-

tainly as great a variable as shrink through evaporation and cutting should be, and they deducted the customer shrink, so to speak, from the total shrink and arrived at the loss. The evidence in the case even went beyond that as against the claim. A manager of the store left suddenly, but he was put on the stand and denied he had any connection with the theft. His evidence contradicted the theft. Nevertheless, the court found that from the accounting evidence that they had conclusively proved that the loss was occasioned by dishonesty.

Now I submit, if that case was correctly decided, then even without Harris' and Jackson's testimony, or Harris' and Merica's testimony, without any evidence of direct theft here we have established an equally good case because there there even is evidence there was no theft. There isn't any such evidence here.

Of course, actually this whole matter is on the motion which I would think would have to fall by the board because the defendant has admitted in their original answer in this case and has admitted in the letter which your Honor allowed in that there was dishonesty to a limited extent on the part of the employees. They have made an admission outright, said we have proved it in the letter.

Now that evidence the jury certainly can consider. (34) I don't see how they can get away from it under any circumstance. And actually when they complain now about taking cost figures as against price figures, those are the same figures they used in their letter. They acknowledged then that was a proper basis for fixing the value.

* * * *

(35) As your Honor has said, a notice before September 1950 was not necessary. When your Honor ruled out some of the proffered testimony on the subject of these

discussions with Mr. Macbeth, Mr. Pickrel has taken the computation and said they do not account for all the meat. That has nothing to do with this case. We are not claiming any loss on lard, any loss on cured products that haven't been smoked. We are not claiming loss of that kind. There is no point in confusing matters by putting that in. We have a complete accounting. The product analysis sheets give a complete account and they are in evidence. They give a complete accounting of what happened to all the fresh pork that was not stolen; give a complete accounting of all the smoked pork that was not stolen and give a complete accounting of all the sausage that was not stolen, and the jury can, if it chooses, check through every one of those sheets to be sure that they do.

Every type of transfer is covered. As Mr. McConkey said on the stand, in a packing plant they use everything but the squeal. That is true. They even recover the part washed off the floor in the cutting room, down the drain. The catch basin catches that and they put it in tankage. They (36) don't waste anything. There is complete accounting in a packing plant that doesn't leave there by dishonest means.

Mr. Beerman said they put in cash register machines. Mr. Smith was employed to set up a good product analysis so they could attempt to keep track of all the product, so they would know what has happening to it. The testimony of Mr. Hadeler is while he didn't specifically verify each one of these, he and his assistants have from time to time checked these and found they were accurate and properly accounted for everything in the disposition of the meat product.

I submit the jury has the right to believe all of that and, in fact, it is definitely true, they should not disbelieve it. Of course, I grant they have a right to disbelieve it if they see

fit. But on the assumption that it is true, they will believe it. There is no explanation other than dishonesty for the excess shrinkage.

And talk about what happened to lard or the other items, in their attempt to befuddle the issues, they are in the product analysis sheets. If we put them on our sheets, there really would be confusion.

It was complained when we took out beef and veal we should prepare another exhibit and we did. If we had lard a similar objection could be made.

Now as to the great to-do about the elimination of beef and veal, a party always has a right to eliminate (37) items which he thinks he may have difficulty in proving and we think we would have difficulty in proving the extent of the beef and veal loss. It is a fact that beef is hung in shrouds which makes the weight of the beef not as accurate as pork, because water gets in the shroud and that affects the opening weight. When I discussed that with the people and recognized that undoubtedly would be brought out, I figured rather than have a big to-do over that, the amount wasn't much, I decided to eliminate it from the case.

The deduction of the employees' cafeteria, the testimony was that no deduction was made of record, the only thing that was not accounted for. A generous estimate was given because at that time there were two-thirds as many employees as today. The amount that goes there is known today. Two-thirds of that was taken at that time. Even though it was not in operation over that whole period, on the assumption it was operating for the longer period, a credit was allowed for an estimate based on two-thirds of the amount that goes there today, at the highest price of the product at that time, to be sure that everything was on the maximum side, and nobody complained that the amount of the allowance was insufficient.

Argument of Plaintiff's Counsel at End of Plaintiff's Case

As to the last three weeks in September, there again it is a matter for the jury. If the jury thinks there should have been subtracted on the average for the three (38) weeks from the 48 week period, the paper figures that Mr. Selva asked me about this morning, they can do that, if they wish. Our testimony is that is the wrong way to do it based on the accounting methods. The jury doesn't have to go along with us, but there is nothing speculative about it. There is direct evidence that is the right way to do it. They could choose to believe it or not believe it, conclude that is what they will do or not do.

Mr. Pickrel was in error when he said you can't have identified and unidentified employees. There is nothing like that in the policy. The policy does eliminate the company's liability of $20,000 on identifiable employees, but it doesn't say you can't have both. According to the testimony of Harris, there is both kind of thieving going on, his ring plus the other names he didn't know.

* * * *

(40) I submit, therefore, as far as this case is concerned, first of all an admission of the defendant, there is no question but the case must go to the jury on that, regardless of Harris, regardless of any figures. Secondly, regardless of the figures produced on the basis of Harris' testimony, there is a jury question.

Now, I might point out to your Honor at this time even though possibly it won't affect the immediate motion, but there is a great distinction to be drawn between certainty with which the fact of damage must be proved and the certainty with which the amount of damage must be proved. The law is that you can't recover if the fact that you were damaged is uncertain, that is remote and speculative. But if the fact that you were damaged is proved, you

are not required to prove with the same degree of certainty as to the amount. In many cases the amount is very difficult and to some degree speculative. Every case involving loss of profits involves considerable speculation.

In a case involving condemnation where you get one real estate man gets on the stand and says it is worth (41) $20,000 and another one $50,000, what is the jury going to do? They don't have to believe either one. They pick a figure somewhere in between.

Where a man has pain and suffering, how much is that worth? There is no standard on which the jury has to go but they can give him damages without. Where a man claims a loss of permanent earning capacity that involves a great deal of contingencies. He may get better. His wages might go up in the future. Who knows? The jury still is entitled to arrive at what is in their view a reasonable amount.

What is it worth for a man to lose an arm?

THE COURT: I think that is not analagous.

MR. GOLDMAN: Well, I am saying, your Honor, the only reason I am pointing that out is, you have many cases where the ascertainment of the amount is much more indefinite. In fact, here in this case, our figures, if our witnesses are to be believed are not uncertain at all. It is only if you don't believe our witnesses that they become uncertain.

Now, the Supreme Court of the United States has passed on, not a case just like but on the general rule, a case somewhat analagous, the famous Wages and Hours case, 328 U. S. 680, where it was contended that this employee couldn't prove how much time was involved in portal to portal and what the value of his services were. He had no proof; it is all estimates on his part, and the Supreme (42) Court says at page 688, "Even where the lack of accurate records grows out of a bona fide mistake as to whether

certain activities or non-activities constitute work, the employer, having received the benefits of such work, cannot object to the payment for the work on the most accurate basis possible under the circumstances. Nor is such a result to be condemned by the rule that precludes the recovery of uncertain and speculative damages. That rule applies only to situations where the fact of damage is itself uncertain. But here we are assuming that the employee has proved that he has performed work and has not been paid in accordance with the statute. The damage is therefore certain."

In the present case we have proved there has been theft and can estimate the amount through Harris' testimony.

"The uncertainty lies only in the amount of damages arising from the statutory violation by the employer. In such a case it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. It is enough under these circumstances if there is a basis for a reasonable inference as to the extent of the damages."

Now, we say that certainly there is a basis for reasonable inference, the jury can draw. It will not have to accept our claims, but it can if they want to.

(43) There is another case in the Supreme Court, *Story Parchment Co.* v. *Paterson Parchment Co.*, 282 U.S. 555, where a man sued in an anti-trust violation attempted to show damage for loss of business, future profits, and that sort of stuff, the Supreme Court said: "Nor can we accept the view of that court that the verdict of the jury, in so far as it included damages for the first item, cannot stand because it was based upon mere speculation and conjecture. This characterization of the basis for the verdict is unwarranted. It is true that there was uncertainty as to the

extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount."

The third case involving Palmer et al., Trustees v. Connecticut Ry. and Lighting Co., 311 U. S. 544, in which the Court says, "Certainty in the fact of damage is essential. Certainty as to the amount goes no further than to require a basis for a reasoned conclusion."

I submit, therefore, that the motion is not well (44) taken and that the matter should be submitted to the jury.

FIRST SUPPLEMENTAL TRANSCRIPT

Argument of Plaintiff's Counsel

(1) (The following was omitted at p. 1126 of the transcript in Case No. 1622, Sucher Packing v. Manufacturers Insurance.)

(Counsel for Defendant's arguments on motion to dismiss omitted.)

MR. GOLDMAN: Actually, I submit that opposing counsel's argument is really addressed more properly to the jury as to whether credibility lies and what inferences the jury should make from the facts.

To summarize our position, which I did before, it is our contention in this case this is not the usual type of case where a person is claiming, strictly speaking, inventory shortage and is introducing figures and letting it go at that.

Argument of Plaintiff's Counsel to Court at Close of All the Evidence

In this case, what we are contending is that there is direct evidence of theft.

The evidence on the part of Harris, which Mr. Selva makes light of, but which the jury is entitled to believe and which I don't see why they wouldn't believe, because of the fact it would be an amazing thing for a man to admit having committed crimes for which he could be prosecuted. After all, he was only convicted for what he was caught with, and it is amazing that a man would make such an admission, if it were not true.

* * * *

(3) So, we do have the definite evidence in the case from Harris that almost every day they put barrels on the truck and hauled it away. For three weeks he was the hauler. Earlier than that he was one of the loaders; that they hauled out anywhere from four to eight barrels. I believe his testimony was that those barrels contained from, I think, five to ten hams, depending on the size, and from twenty to twenty-five bacons. And the testimony of the weight, comparable weight of shoulder butts can be computed too. He said those were the three main (4) items that they hauled away.

He also testified that he observed other employees daily—every day some employees taking stuff for personal use; the fresh pork and sausage items; that they put it in their pockets. Mr. Harris didn't say in his testimony anything about capacious purses. That is what I said in my opening statement. That is one of the statements apparently we did not establish, a capacious purse. Mr. Harris said boxes.

We have the testimony there of Harris that about one-third of the employes were engaged in that pilfering. So, we have direct testimony. It is a very difficult thing to get direct testimony of theft. There were detectives hired,

as the evidence shows. They were never able to catch anybody. The supervisors were not able to catch anybody. When Mr. McConkey was around, nobody would steal anything. Nobody was caught except for a couple of people Mr. Beerman caught when he was there for a while, maybe being a little more alert than most people and being a little more suspicious as to their conduct. Up until the time that Harris was caught redhanded with the trash truck, they didn't actually catch anybody other than (5) these examples of small, petty pilfering.

So that, there is definite direct evidence from which one could make a rough estimate of how much had been stolen over a period of time. It would not be exact. It would be an approximation only. The law does not require that once it has been established with the requisite degree of certainty that damage has occurred, it does not require one to establish the amount of the damage with exactness. An approximation is suffiicient.

There are a number of cases which may be cited, many of them in the Supreme Court of the United States.

THE COURT: You cited them the other day, and you cited them in your supplemental trial memorandum. It is not necessary to go over that again.

MR. GOLDMAN: Those cases hold very plainly that where damage has been established by direct evidence, it is unnecessary to establish the amount with a degree of exactness, as long as there is some basis from which reasonable inferences may be drawn.

There are two methods that could be used in this case. The estimates could be made as to (6) the amounts in the barrels and over a period of time what that amounted to by the estimates of Mr. Smith into poundage and the figures given on the sheet as to the price and so it could be worked out in that way.

In addition to that, the jury may have the benefit of such weight as they see fit after hearing all the defendant's arguments which they make claiming how uncertain the figures submitted are. After all, that is merely a contention. The evidence of the plaintiff's witnesses is that there is no speculation. I am talking about the factual witnesses. There is no speculation involved in the product analysis sheets that affect the total result in any substantial manner. The fact is, and I think can mathematically be demonstrated, the intermediate inventories could be thrown away, nobody pay any attention to them whatever, because when you close one week with an inventory, no matter how wrong it may be, so far as those inventory figures are concerned, no matter how wrong they may be, they have no effect on this. I think the testimony has been, even if you ignore the inventory entirely, as long as you open up the next week with the same thing, it will be (7) self-correcting as far as the figures are concerned.

It has also been testified, as far as the beginning and ending inventories are concerned, any probable error in those inventories are based on the fact that there may have been some degree of approximation in there, does not have a significant effect on the total result when compared to the total volume of product that flowed through the plant.

There has not been any inventory which showed any great error in those approximations. It was admitted by the plaintiff that the weekly inventory other than the annual fiscal year ending inventory were not exact to the pound, but there has been no showing that there was any great errors in this. If you take any one of these samples and add up the probable error, they wouldn't amount to more than, at the most, a couple of thousand pounds. Assuming they were twenty pounds off, or take the maximum amounts of all these various hams they talk about, it

would only come to a couple of thousand pounds. When you consider the large volume of hams that flow through there, it would be insignificant.

(8) It has been the testimony of expert witnesses, factual witnesses, that the jury has a right to believe — they don't have to believe it — they could agree with the defendant that these experts don't know what they are talking about, even though it is a mathematical certainty that the intervening inventories can be ignored, I suppose even if the jury were instructed they had to consider that in their deliberations, who knows, they might ignore such instructions. I don't know. If they couldn't understand it, they might disregard it. They might say, "Those errors are not important."

As far as alleged errors in transfer, the plaintiff's witnesses say those are not errors. Plaintiff's witnesses say that it is in accordance with packing house practice and gives you an accurate result.

While it is true that in giving these round figures they were only to the nearest ham or bacon, as the case may be, when they came to the vat. They actually weighed these trucks of hams before putting them into the 14-hundred or 15-hundred vat, whatever it might be, and that if they were a ham under or over, if there was one (9) ham too many, they would take one out and one in if it be one under.

So, they might be within a part of a ham over or under the 14-hundred pounds or part of the bacon.

But, statistically, I can argue, your Honor, I think—your Honor wouldn't permit me to ask the question of the witnesses—it is a matter of mathematical statistics when you have thousands of cases of that kind where you might have overs and unders and there is no deliberate effort to make them one way or the other, as a matter of statistics

and a matter of actuarial computation, the law of probabilities come into effect, when you have those thousands of cases they average out in the round number.

That can be argued to the jury. The opposing side can say, "no, it is not so", and the jury don't have to believe me, if they don't want to. They can say, "Yes. The method of establishing the amounts for the transfers is inaccurate." Our people say it is accurate.

Their experience in the field, they have been in the business for years, Mr. Smith has been in the packing business for over twenty years (10) doing this controlling and supervision work. He is entitled to credit, if the jury wishes to give it to him, and he says it is accurate. Mr. McConkey has been in the business for many years, thirty years I think he said. He says it is accurate.

Now, I think that is a matter for the jury to decide whether they think it is or is not. They don't have to believe the witness. They can disregard this statement or they can accept it.

It seems to me that based on the small amount of mathematics I have had and familiarity with statistics, when you have a situation of that kind where you have overs and unders, if not deliberately planned one way or the other, which is by chance, and this is all by chance, and these small quantities, that the average over a period of time will be self-correcting, and you have here an average of almost a year in each case which involves close to hundreds of thousands of pieces, so it will be self-correcting.

So, I submit, therefore, that the alleged errors on this computation, those involving the intermediate inventories can be ignored completely, because they are (11) mathematically out of the picture. Those involved in the opening and closing inventories, one of those is correct. That is one beginning the second period. As to the others, it is

insignificant in the total result, and as far as alleged errors in transfers, there aren't any, according to our witnesses. Those are accurate.

Now, it has been admitted by Mr. Sachs on the stand that from such examination he made, he never found one example of where a figure was copied wrong or totaled wrong. There was some effort made to say, "Well, there may be in copying and transcribing these figures, because a number of different employes were involved." And he was satisfied from his examination that he had done on them. If he had any idea there were error he would have gone further.

So, we have a right to assume there weren't any errors.

Therefore, on the basis of the evidence submitted, if the plaintiff's witnesses are believed, there is no error involved in the computation, either of mistake or in transfers, or in the inventory. As I said before, there (12) may be in the opening and closing first period, and the closing of the second period, but any probable amount of error in those inventories are insignificant and do not materially affect the claim.

Now, there have been statements, as Mr. Hadler expressed the opinion, that these figures could not be said to represent theft. That is his opinion. He said to you he could not show it down to the penny. On the stand he explained that answer. He said he, himself, while satisfied that the factors used were correct, in his opinion they were arbitrary.

Now, according to the testimony of plaintiff's witnesses that the percentage of shrink allowed as normal were more than adequate, so long as they are not less than adequate, even if incorrect, the defendant suffers no harm. If they are more than adequate, the plaintiff has not indicated a large enough figure for his loss.

They make a great to-do about the fact that Mr. Hadler put on the sheet referring to cooler shrinkage. Now, actually, practically all the shrink in a packing plant is cooler shrink. There are different kinds of cooler shrinks. (13) It is true he said in 1953 when he was asked about that, he could not remember what he was told in 1950. He was under the impression that meant the original chilling shrink, but he professed he might have been in error and thought he was.

Of course, it is true that he discussed it with Mr. Smith who may have influenced him. But the fact is, Mr. Smith testified from actual test that the initial chilling shrink is approximately one and one-half to one and three-quarters percent. Mr. Davis, who is employed by a nationally-known concern that does nothing but consult with packers on their problems, he said he personally had supervised and had been involved in tests of shrinkage in twenty different plants and he says that one and one-half percent is adequate as the average for the initial chilling shrink.

He says in computing his averages he figures variations in temperature and humidity and all those other things that may go into it, and keeping stuff over the weekend as it would be in normal packing house practice.

Sucher ships out on Sunday night. (14) That is a 12-hour difference. Mr. Davis said in his figures, in figuring averages you figure those various aspects of it.

The testimony of Mr. Smith was that the cutting shrink was one-fourth of one percent. Mr. McConkey said it was one-half to one-quarter. Mr. Davis says a maximum of one-half. I think it was three percent is more than adequate to cover from hot weight to sale in the ordinary course of packing house business.

In addition to that, the plaintiff for purposes of being conservative in the claim, allowed an additional half percent, allowing a total of three and one-half percent.

According to Mr. Sachs, he admitted on the stand the plaintiff had allowed a total shrinkage as credit against any possible claim, in fresh pork between 300,000 and 350,000 pounds and for the other between 590,000 and 600,000 pounds.

There has been no evidence to contradict the plaintiff's testimony as to the proper shrink for sausage or the proper shrink for smoked pork. That stands uncontradicted in the record. In fact, the testimony of Mr. (15) Davis was that the plaintiff's figure of five percent is far in excess of what is allowed in the industry. His figures were two and one-half to three percent. I submit, under those facts, the jury has a right to believe the testimony they hear, particularly where it is uncontradicted, where these figures were more than adequate to cover any normal shrink due to acts of nature or ordinary business operations.

Now, even if you take the testimony of defendant's witnesses, the only testimony they gave was with respect to fresh pork. Mr. Bruner says his figures on cutting shrink were so unreliable he didn't want to stand up for them, there was too many possibilities of errors. So they don't mean anything. As to his normal shrink, he says it is two and one-half to three for twenty-four hours. The evidence at Suchers is that they kill one afternoon and cut the next morning. They don't stay in the cooler twenty-four hours. It is between sixteen and eighteen hours. The witness admitted any reduction in time in the cooler would cut down the chilling shrink, and if you take the thing percentage-wise, even Mr. Bruner's figures, could (16) be something around two percent or less, which is more than adequate, which the plaintiff use.

There is also some question about the reliability of Mr. Buner's figures and apparently in small plants where they run tests in a laboratory rather than normal operation.

Mr. Bowser had only eight or ten hogs. It may be his floor was dry which indicated that the atmosphere was wrong when he got excessive shrink. Be that as it may, it is a matter of argument to the jury as to the weight to be given to the figures. You have that in any case where you have experts on one side making claims and experts on the other side make other claims. The jury has to decide which is right.

You have that when you have appraisers as to value. You have that when you have any scientific testimony, medical testimony of any kind in a case. One doctor says yes, this is the result of something else, and the other doctor says no. The jury has a right to believe either one or neither, as the case may be.

So, I submit that all the arguments made by opposing counsel are more properly directed to the jury for the jury's consideration, rather (17) than on the question of law.

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(18) There have been some comments made that we did not allow for cutting shrink. Mr. Smith, when he testified. gave the figures for cutting shrink before there was any cross-examination. There wasn't any effort to avoid that fact. Of course, there is cutting shrink.

Under Sucher's figures, Suchers always took three percent off the hot weight. It is an accounting practice when you expect there is going to be some diminution of a product, you charge yourself with it in the beginning so you don't come up and find yourself short. That is why they took the three percent off in the beginning to account for all the natural shrink and to be conservative they made it plenty big (19) until the time of sale. So when they computed what they could expect to have for sale, they would not be cutting themselves, and if it were any more than that

it would be necessary to take it. The very fact that they used the three percent before this claim was ever even thought of and right in their regular practice, indicates very plainly that they considered that was adequate.

As I said before, there is no contest on the amount of normal shrink with respect to smoked pork or sausage. The only contest is with respect to fresh pork and that is a matter for the jury to resolve depending on what credit they want to give the witnesses and what weight.

Now this question about the record of the week of October 29th. After all, no one was expecting to make a claim or knew when the claim would be made against the bonding company until Harris was caught. There was no reason to preserve every week's record and these product analysis sheets had no value for an extended period of time, after they had been used. Those are not the permanent records of the company, such as their general ledgers and journals and that sort (20) of thing would be. These product analysis sheets are for the company's own information and after a period of time there is no point in keeping them.

Now, they did not deliberately get rid of this one folder. It was mislaid. Maybe someday it will be found just like the three folders for the last three weeks of September. It is amazing that they can find papers that they have intended to throw out and didn't. Some of these they deliberately throw out so as not to deprive them of space they need for other purposes.

The same is true as to the humidity and refrigeration records. Obviously, they wouldn't have done Mr. Sachs any good. There is no occasion to keep those records for more than a couple of months at a time. They were not expecting to make a claim back in 1949 and 1950, they were not preparing to make a claim. They knew something was wrong and were trying to find who was getting away with

the stuff. They were not doing that with the idea of making a claim. The testimony of Mr. Smith is, however, that there were no conditions there which would have adversely affected the amount of normal shrink.

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(23) There are three columns only for fresh pork; one for smoked pork and sausage. The fresh pork starting place is the weight of the dressed hog. The smoked pork starting place is the weight of the smoked pork after it is smoked. The separate weight don't go back to (24) the transfer to cure. Mr. Sachs admitted it showed a separate weight.

Had we used the earlier figures, then we would have been subject to criticism because you would have had the added weight in the cure and the subtracted weight in the smoked.

In this case also, in using the sausage we start with the weight of the sausage as it is produced, after it is produced, and the shrink is from that point forward and from the total shrink we subtract what we say is the normal shrink and which we say has been more than generous, more than adequate, and only charge against this claim the excess over and above the more than adequate normal we have allowed.

The same is true on smoked pork. We start with smoked pork weight and subtract from it the normal shrink which we say is more than adequate and charge against the claim only the excess. It does not go back to fresh pork at all and that is why I say that these figures on the board are nothing but to confuse matters.

Now, Mr. Selva says on this one case 111 Federal (2nd), which I cited, your Honor, the other day, that the manager said that the only (25) thing left to account for the missing merchandise was theft. We would have been very glad to

have our witnesses say that, if your Honor had permitted it. But questions of that kind, the objections to those were sustained. Obviously, it was not on the basis of that statement of the manager that the Court came to its conclusion. It was on the basis that it felt from the facts in the case, not the conclusion of any one witness, that the result was theft.

I maintain this, that there are two bases on which we should recover, either of which would be sufficient and when taken together make the case that much stronger. From Mr. Harris' testimony, we have direct evidence. We also have in the case the admission on the part of the defendant in a letter that at least $291 worth of merchandise was stolen. Even if you would substract the beef out of that, it is $270. I may say they are apparently willing to say we proved that conclusively. Of course, that is what the people were caught with.

In addition to Harris' testimony, I maintain from the figures we have produced, if (26) our witnesses are to be believed by the jury, and we have a right to believe that they will believe them, if we didn't we wouldn't have come into court, the jury has a right to believe that these figures are not subject to error, are not erroneous, and that such errors as there may be in the opening and closing inventories are insignificant in the total results. And they also have a right to believe that the allowances we have made which go into the hundreds of thousands of pounds. I think your Honor will see as to smoked sausage a tremendous shrink which would be more than from natural causes, but we said we would take those figures. There is a shrink that occurs in addition to that. There is no other explanation but theft.

In order to conclude that there is no other explanation, one has to reject the contentions of the plaintiff that the

normal shrink figures are adequate or reject the contentions of the plaintiff and the evidence of plaintiff's witnesses that the figures are not in error, or reject the contention of the plaintiff and the evidence that any possible error in the opening and closing inventories of the periods have only (27) an insignificant effect, if there are such errors.

I, therefore, submit that what we have in this case is direct evidence of theft from which computations can be made and that the jury in addition, for whatever weight is chooses to give it and for whatever credit it wishes to give the witnesses, based on its prerogatives as a jury, they can have the figures submitted to them. And, of course, they will be limited; they cannot bring in a verdict in excess of the amount under the bond. And, I may say at this point, I think we are limited to a total of $120,000. I will make that concession because we have shown only five identified employes, plus unidentifiable employes as a group who are involved in the theft. Under the terms of the bond we are entitled only to $20,000 maximum for each instance. And since the bond says "acting alone or in collusion with others", it is not our obligation to show how much each individual stole.

But if we show there was a ring of originally the four participants, as testified by Harris, Harris, Jackson, Maiden and Hurt, if this ring got away with $80,000 worth, then we are (28) entitled, as long as it says "acting alone or in collusion with others", at least $80,000, and if during the period that Early was connected with the ring, there was an additional $20,000 taken, we would be entitled to another $20,000.

In my own mind I question whether there was $20,000 worth taken while Early was a member of the ring, because he was a member of it a short time.

* * * *

Colloquy Between Court and Counsel

(30) THE COURT: The jurors will find that X pounds of these different categories of pork were stolen. How do they arrive at the value?

MR. GOLDMAN: That could be done, your Honor, in these folders. We tried to get it in by the testimony of Mr. Beerman which was not allowed, but the proffers are in the record, should your Honor change his mind. There are two points, one is that the evidence in the case shows the sales price, the average sales price. Obviously, the product was stolen over a period of time and the bond does not require you to identify with particularity each piece stolen, and what day it was stolen, which would make the bond unreasonable, because obviously, you would not know that. Thefts are stealthy. They sometimes don't even leave fingerprints. Their object is to defy apprehension and being caught, so that, you have to use the best evidence available in the case when you are attempting to prove the amount of damage, which, in this case is the average price. The sale price is the value, (31) that is the market. One would not have the right to assume Sucher could sell above the market price. But if there is any question about it, in these documents which have been testified to, I think Mr. Sachs agreed that in these documents are all the figures necessary to arrive at production cost.

* * * *

(32) THE COURT: This is the end of the 10th day of this trial. The Court recognizes that the trial work is strenuous both for the lawyers and the Court. I know that there are times that the nerves of all parties, including the Court, become jangled. We have reached a critical point in the trial of this case which has imposed upon the Court the responsibility of making a decision on this motion which affects the rights of the parties. The Court approaches the

matter of reaching this decision humbly and after long and very careful consideration of the problem and in the very best of the Court's ability, he will decide it.

I quote from a supplemental trial memorandum of counsel for plaintiff in which he states, as indicated in plaintiff's original trial memorandum, although I think it is not too obvious (Reads from trial memorandum of plaintiff.) I take it that the Court is (33) justified at this point in accepting that as plaintiff's theory that he is proceeding upon a matter of establishing direct theft and using the inventory as corroborating evidence.

Much has been said about whether or not the plaintiff's witnesses should be believed. I think the Court must decide the motion before it at this time upon the theory that all of the evidence of plaintiff's witnesses would be believed. The Court has a duty first to rule as a matter of law, assuming that all they say is worthy of belief or is to be believed, whether or not then there is any question of fact to be submitted to the jury.

It is obvious and well known that in negligence cases, the Court frequently must pass as a matter of law on whether certain conduct of a party is negligence. And so, in this case the Court comes to the point of passing upon the evidence submitted by the plaintiff as to whether or not believing all of it makes a case sufficient as a matter of law to go to the jury.

Upon the question of the inventory shortage, it seems to the Court to make little difference whether or not it is to be used as (34) corroborating evidence or whether or not the plaintiff seeks to recover the amount of the inventory shortage. It makes this difference in the mind of the Court: It seems that it would be less important or that there would be less reason for that matter of inventory

shortage to go to the jury, if it is merely being used as corroborating evidence, because in these cases where they seek a loss based on inventory shortage, they seek to recover the full amount of the inventory shortage on the theory that that is the proven loss.

I think it has been stated here many times through this trial, and not a matter in dispute, that virtually the plaintiff must exclude every explanation or every hypothesis except theft, and that there must be only the inference open that theft is the only explanation; that that fact must be open to only that reasonable and logical inference, that theft is the only explanation.

The Court is of the opinion that the facts in this case do not establish that situation with reference to the inventory loss attempted to be shown here.

* * * *

(35) The plaintiff in this case has asked the defendant for $120,000. I think it could be (36) expected that the plaintiff must offer more direct and correct proof than merely approximations.

* * * *

(37) Then there is the matter of claims made here. Plaintiff seeks, under the terms of the policy, to obtain $20,000 maximum provided by the policy for unidentifiable thefts and $100,000 for thefts of identified employes, with a total amount claimed of $146,000 now. There is no point at which the jury can tell where the loss for unidentified employes began and identified employes end.

* * * *

(38) Referring then to plaintiff's supplemental trial brief, it is stated: (Reads from plaintiff's supplemental trial brief.) In other words, the jury may determine what they think

these persons actually took and then attempt to test whether they are correct or not by the corroborating evidence of the inventory shortage. And Mr. Goldman says, whether they use it or not, as they see fit, such amount as they please. But the jury cannot speculate like that. There is nothing there that would guide them at all as to how much they could use, except if they are shocked with allowing plaintiff $120,000, they may say (39) "Well, we will only allow them half of that; cut it down ten or twenty percent." There is no basis for such a calculation.

So, the ruling of the Court, so far as the inventory shortages is concerned, that it shall not be submitted to the jury for the jury's consideration in arriving at any damages for the plaintiff.

Secondly, the Court will not submit to the jury any question upon the matter of damages for loss sustained by unidentified employes for there is no basis upon which such a determination could be made.

* * * *

(41) I realize that the matter of attempting to calculate damages on that testimony is rather uncertain and indefinite. I think the cases cited by Mr. Goldman would stand perhaps for the right to have the jury attempt to fix them, even though it was uncertain. I think those cases do not go to the extent of permitting the jury (42) to assess damages on such testimony as the inventory shortage.

The exhibits too, I think should be separated and only those exhibits that would have a bearing on the case, aside from the matter of the inventory shortage should go to the jury.

Of course, the arguments will be limited to the issues which I have indicated are proper to go to the jury.

I think that about covers anything I can think of.

Colloquy Between Court and Counsel

MR. GOLDMAN: Your Honor, I had prepared some special charges. In view of your Honor's statement I could not offer a number of these. I wonder if I could be permitted to revise these over night?

THE COURT: I don't know whether counsel for the defense have any or not. If you do, I would like to meet with counsel at 9:30 and receive those.